No. 16-1276	
Title:	**Digital Realty Trust, Inc., Petitioner** **v.** **Paul Somers**
Docketed:	April 25, 2017
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-17352)
Decision Date:	March 8, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 25 2017	Petition for a writ of certiorari filed. (Response due May 25, 2017)
May 03 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Respondent.
May 08 2017	Order extending time to file response to petition to and including May 30, 2017.
May 10 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
May 24 2017	Brief amici curiae of New England Legal Foundation, et al. filed. (Distributed)
May 25 2017	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. (Distributed)
May 25 2017	Brief amicus curiae of DRI-The Voice of the Defense Bar filed. (Distributed)
May 25 2017	Brief amicus curiae of Lime Energy Services Company filed. (Distributed)
May 26 2017	Letter of May 26, 2017, from counsel for petitioner waiving the 14-day waiting period for the distribution of the petition pursuant to Rule 15.5 received.
May 30 2017	DISTRIBUTED for Conference of June 15, 2017.
May 30 2017	Brief of respondent Paul Somers in opposition filed. (Distributed)

Jun 02 2017	Reply of petitioner Digital Realty Trust, Inc. filed. (Distributed)
Jun 19 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	Petition GRANTED.
Jul 06 2017	Consent the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Jul 12 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 24, 2017.
Jul 12 2017	The time to file respondent's brief on the merits is extended to and including October 10, 2017.
Jul 12 2017	Motion to dispense with printing the joint appendix filed by petitioner Digital Realty Trust, Inc.
Jul 18 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent.
Aug 24 2017	Brief of petitioner Digital Realty Trust, Inc. filed.
Aug 25 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Aug 29 2017	Brief amici curiae of New England Legal Foundation, et al. filed.
Aug 31 2017	Brief amicus curiae of The Center for Workplace Compliance filed.
Aug 31 2017	Brief amicus curiae of Cato Institute filed.
Aug 31 2017	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Aug 31 2017	Brief amici curiae of Lime Energy Services Company and Prestige Cruises International filed.
Oct 06 2017	SET FOR ARGUMENT ON Tuesday, November 28, 2017.
Oct 10 2017	Brief of respondent Paul Somers filed.

Oct 11 2017	Motion to argue pro hac vice filed by the Solicitor General.
Oct 12 2017	CIRCULATED
Oct 17 2017	Brief amici curiae of National Whistleblower Center, et al. filed. (Distributed)
Oct 17 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 17 2017	Brief amicus curiae of Senator Charles Grassley filed. (Distributed)
Oct 17 2017	Brief amicus curiae of United States filed. (Distributed)
Oct 17 2017	Brief amicus curiae of Ethical Systems, Inc. filed. (Distributed)
Oct 17 2017	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed. (Distributed)
Oct 18 2017	Record requested from the U.S.C.A. 9th Circuit.
Oct 18 2017	Record received from the U.S.C.A. 9th Circuit is electronic and located on PACER.
Nov 06 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 06 2017	Motion to argue pro hac vice filed by the Solicitor General GRANTED.
Nov 09 2017	Reply of petitioner Digital Realty Trust, Inc. filed. (Distributed)
Nov 28 2017	Argued. For petitioner: Kannon K. Shanmugam, Washington, D. C. For respondent: Daniel L. Geyser, Dallas, Tex.; and Christopher G. Michel, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (Pro hac vice; for United States, as amicus curiae.)

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RECORD AND BRIEFS.

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's definition of a "whistleblower."

CORPORATE DISCLOSURE STATEMENT

Petitioner Digital Realty Trust, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No.

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Digital Realty Trust, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 850 F.3d 1045. The order of the district court denying petitioner's motion to dismiss (App., *infra*, 12a-47a) is reported at 119 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. 78u-6(a)(6), provides:

> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

Section 922 of the Dodd-Frank Act, codified in relevant part at 15 U.S.C. 78u-6(h)(1)(A), further provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

STATEMENT

This case presents a clear and intractable conflict on an important and recurring question of statutory interpretation. The Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). The Act proceeds to prohibit retaliation against "whistleblowers" who, *inter alia*, "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" and other securities laws. 15 U.S.C. 78u-6(h)(1)(A). The question presented is whether that anti-retaliation provision extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the statutory definition of a "whistleblower."

Respondent is a former employee of petitioner. As is relevant here, after being terminated, he sued under the anti-retaliation provision of the Dodd-Frank Act, alleging that he was fired for making internal complaints protected under the Sarbanes-Oxley Act. Respondent did not report the alleged misconduct to the SEC. Petitioner moved to dismiss the Dodd-Frank Act claim, arguing that respondent could not maintain a claim under the anti-retaliation provision because he was not a "whistleblower" within the meaning of the provision. The district court denied the motion.

A divided panel of the Ninth Circuit affirmed. Over a dissent from Judge Owens, the court held that the anti-retaliation provision applies to all individuals who make internal reports under the Sarbanes-Oxley Act and other federal laws, regardless of whether the individual qualifies as a "whistleblower" under the statutory definition. As the Ninth Circuit explicitly recognized, its decision deepened a split of authority in the federal courts of appeals on the question presented. Because this case is an

optimal vehicle for resolving that conflict, the petition for a writ of certiorari should be granted.

1. This case concerns Section 922 of the Dodd-Frank Act, entitled "Securities Whistleblower Incentives and Protection" and codified at 15 U.S.C. 78u-6. That section has three principal parts: it defines key terms, creates an incentive program for "whistleblowers" who report to the SEC, and protects those same "whistleblowers" from retaliation.

The definitional provision starts by specifying that "the following definitions shall apply" "[i]n this section." 15 U.S.C. 78u-6(a). As relevant here, it proceeds to define a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6).

Incorporating that definition, the section then creates an incentive program for "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). Such whistleblowers are entitled to receive a monetary "award" from a special fund created by the Act. See 15 U.S.C. 78u-6(b), (g).

Finally, in its anti-retaliation provision, the section guarantees "[p]rotection of whistleblowers." 15 U.S.C. 78u-6(h)(1)(A). Specifically, it provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. *Ibid.* First, a whistleblower is protected from retaliation for "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-

6(h)(1)(A)(i). Second, a whistleblower is protected for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(ii). Third, a whistleblower is protected for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii) (citation omitted).

In 2011, the SEC issued a rule interpreting Section 78u-6. Consistent with the definition in Section 78u-6(a)(6), the rule first explains: "You are a whistleblower if * * * you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws * * * that has occurred, is ongoing, or is about to occur." 17 C.F.R. 240.21F-2(a)(1). Remarkably, however, the rule goes on to provide a different definition of "whistleblower" for purposes of the anti-retaliation provision. The rule states that, "[f]or purposes of the anti-retaliation protections afforded by Section [78u-6(h)(1)] * * * you are a whistleblower if * * * [you provide] information in a manner described in Section [78u-6(h)(1)(A)]." 17 C.F.R. 240.21F-2(b)(1)(ii). In other words, the SEC's rule defines "whistleblower" for purposes of the anti-retaliation provision not by reference to the statutory definition of "whistleblower," but rather by reference to the activity protected by that provision.

2. Petitioner is a real estate investment trust that owns, acquires, and develops data centers. Petitioner

hired respondent as a vice president of portfolio management in 2010, and it fired respondent in April 2014. App., *infra*, 3a, 14a-15a.

In November 2014, respondent filed suit against petitioner and Ellen Jacobs, a senior vice president for human resources, in the United States District Court for the Northern District of California. As relevant here, respondent alleged that, shortly before being fired, he had complained to senior management that his supervisor had eliminated some internal controls over certain corporate actions and had engaged in other misconduct, including hiding substantial cost overruns on a project in Hong Kong. It is undisputed that respondent did not report the alleged misconduct to the SEC. He nevertheless asserted in his complaint that petitioner had retaliated against him in violation of the anti-retaliation provision of the Dodd-Frank Act by firing him for, *inter alia*, making an internal report protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a.[1]

3. Petitioner moved to dismiss the Dodd-Frank Act claim. Petitioner argued that respondent was not a "whistleblower" within the meaning of the anti-retaliation provision because he did not report the alleged misconduct to the SEC; as a result, the anti-retaliation provision did not apply. App., *infra*, 13a.

The district court denied the motion. App., *infra*, 12a-47a. At the outset, the court acknowledged that the Dodd-Frank Act "defines a 'whistleblower' as 'any individual who provides * * * information relating to a violation of the securities laws *to the Commission*.'" App., *infra*, 18a-19a (quoting 15 U.S.C. 78u-6(a)(6)). The court never-

[1] Ms. Jacobs was not named as a defendant on the Dodd-Frank Act claim.

theless concluded that the language in the statutory definition was ambiguous in light of Section 78u-6(h)(1)(A)(iii), which "prohibit[s] retaliatory acts against employees who make" internal reports of securities-law violations. *Id.* at 26a. Because the court could not "find a clear and simple way to read the statutory provisions * * * in perfect harmony with one another," it deferred to the SEC's interpretation, under which an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. *Id.* at 40a.

Although the district court denied petitioner's motion to dismiss, it certified its order for interlocutory review under 28 U.S.C. 1292(b). App., *infra*, 46a-47a. The court recognized that there was a "serious split in authority" on the issue, with the Fifth Circuit, the only court of appeals to have considered the question at that time, unanimously reaching the opposite conclusion. D. Ct. Dkt. 61, at 4 (July 22, 2015) (citing *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)).

4. The court of appeals granted interlocutory review. While the appeal was pending, a divided panel of the Second Circuit issued an opinion disagreeing with the Fifth Circuit and holding that an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. See *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). Judge Jacobs dissented. See *id.* at 155.

The SEC filed an amicus brief in the court of appeals supporting respondent and defending its rule interpreting Section 78u-6. See SEC C.A. Br. 19-37. The SEC also participated in oral argument.

5. A divided panel of the court of appeals affirmed. App., *infra*, 1a-11a.

a. The court of appeals began by acknowledging that the question presented "has divided the federal district and circuit courts." App., *infra*, 1a. It recognized that Section 78u-6(a)(6) defines a "whistleblower" as an individual who "provides * * * information relating to a violation of the securities laws to the Commission." *Id.* at 5a. But the court reasoned that the definition of "whistleblower" "should not be dispositive of the scope of [the Dodd-Frank Act's] later anti-retaliation provision," because "[t]erms can have different operative consequences in different contexts." *Id.* at 7a (citing *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). According to the court, "[s]tatutory definitions are * * * just one indication of meaning," and the anti-retaliation provision "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at 7a-8a (internal quotation marks, brackets, and citation omitted).

A contrary interpretation, the court of appeals continued, would "make little practical sense and undercut congressional intent." App., *infra*, 8a. In the court's view, applying the statutory definition of "whistleblower" would "narrow[] [clause (iii)] to the point of absurdity," on the ground that only individuals who made both internal reports and reports to the SEC would be covered. *Ibid.* The court, however, believed that a broader interpretation was necessary to "give effect to all statutory language." *Ibid.*

For that reason, the court of appeals concluded that the anti-retaliation provision "should be read to provide protections to those who report internally as well as those who report to the SEC." App., *infra*, 10a. The court added that, "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term," the SEC's

interpretation was entitled to deference. *Ibid.* The court reasoned that the SEC's interpretation "accurately reflects Congress's intent to provide broad whistleblower protections under [the Dodd-Frank Act]." *Ibid.* After reviewing the "intercircuit disagreement" on the question presented, the court of appeals ultimately agreed with the Second Circuit's reasoning in *Berman*. *Id.* at 9a-10a.

b. Judge Owens dissented. App., *infra*, 11a. He indicated he would have held that the anti-retaliation provision reaches only individuals who fall within the Act's definition of "whistleblower," based on the reasoning of the Fifth Circuit in *Asadi* and Judge Jacobs' dissent in *Berman*. *Ibid.* He added that, to the extent the majority relied on this Court's decision in *King*, "we should quarantine *King* * * * to the specific facts of that case." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and recurring question involving the interpretation of the Dodd-Frank Act. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the anti-retaliation provision for "whistleblowers" extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." Three courts of appeals and at least two dozen district courts have weighed in on that issue. One court of appeals has held that the anti-retaliation provision reaches only individuals who qualify as "whistleblowers." Two courts of appeals, including the court below, have held (over dissents) that the anti-retaliation provision applies to all individuals, regardless of whether they qualify as "whistleblowers" under the statutory definition.

That conflict cries out for the Court's review, and this case is an optimal vehicle in which to resolve it. The arguments on both sides of the conflict are well developed, having been aired in dozens of opinions. The question presented is one of substantial legal and practical importance, potentially affecting every publicly traded company. And this case presents the question squarely and cleanly. Because this case readily satisfies the criteria for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a preexisting conflict among the federal courts of appeals concerning the scope of the Dodd-Frank Act's anti-retaliation provision.

1. a. As the Ninth Circuit noted (App., *infra*, 2a), the first appellate decision addressing the question presented was the Fifth Circuit's unanimous decision in *Asadi* v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (2013). The plaintiff in that case alleged that his former employer had violated the Dodd-Frank Act's anti-retaliation provision by firing him for internally reporting a possible violation of the Foreign Corrupt Practices Act. See *id.* at 621. There, as here, it was undisputed that the plaintiff had not brought those allegations to the SEC's attention. See *id.* at 624.

The Fifth Circuit held that the district court had correctly dismissed the plaintiff's claim under the anti-retaliation provision. See 720 F.3d at 630. The Fifth Circuit's analysis "start[ed] and end[ed] * * * with the text of the relevant statute." *Id.* at 623. The Act, the court explained, defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the

securities laws *to the Commission*." *Ibid.* (citation omitted). "[S]tanding alone," that definition "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower.'" *Ibid.*

The Fifth Circuit next turned to the anti-retaliation provision. That provision, the court observed, "clearly answers two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity." 720 F.3d at 625. "First, and most critically to this appeal, the answer to the first question is 'a whistleblower.'" *Ibid.* "[T]he answer to the latter question," the court continued, "is 'any lawful act done by the whistleblower' that falls within one of the three categories of action described in the statute." *Ibid.*

The Fifth Circuit rejected the plaintiff's argument that its construction would render clause (iii) of the anti-retaliation provision superfluous. See 720 F.3d at 626-628. To begin with, the court explained, there would be conflict between the definition of a "whistleblower" and clause (iii) only "if [the court] read the three categories of protected activity [in Section 78u-6(h)(1)(A)] as additional definitions of three types of whistleblowers." *Id.* at 626. But the statute explicitly defines a "whistleblower": namely, an individual who reports to the SEC. See *ibid.* And the anti-retaliation provision specifies that no one may retaliate against a "whistleblower." See *ibid.* The Fifth Circuit reasoned that, because Congress used that specific term instead of more general language such as "individual" or "employee," the court "must give that [term] effect." *Id.* at 626-627. The court explained that clause (iii) was not superfluous under its interpretation because it would protect an individual who had reported alleged misconduct both internally and to the SEC but was fired because of the internal report. See *id.* at 627.

To the contrary, the Fifth Circuit observed, a different rule would render the statute's definition of "whistleblower" surplusage, and would also render the anti-retaliation provision of the Sarbanes-Oxley Act, which does not require a report to the SEC, "for practical purposes[] moot." 720 F.3d at 628. Because the Fifth Circuit held that the statute was unambiguous, it concluded that deference to the SEC's interpretation was unwarranted. See *id.* at 629-630.

b. Numerous district courts nationwide have followed the Fifth Circuit, citing *Asadi* and holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Deykes* v. *Cooper-Standard Automotive, Inc.*, Civ. No. 16-11828, 2016 WL 6873395, at *2-*4 (E.D. Mich. Nov. 22, 2016); *Lamb* v. *Rockwell Automation Inc.*, Civ. No. 15-1415, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger* v. *Engility Corp.*, 151 F. Supp. 3d 651, 663-665 (E.D. Va. 2015); *Verble* v. *Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015), aff'd on other grounds, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), cert. denied, No. 16-946 (Mar. 20, 2017); *Duke* v. *Prestige Cruises International, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015); *Verfuerth* v. *Orion Energy Systems, Inc.*, 65 F. Supp. 3d 640, 643-646 (E.D. Wis. 2014); *Englehart* v. *Career Education Corp.*, Civ. No. 14-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Wagner* v. *Bank of America Corp.*, Civ. No. 12-381, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013), aff'd on other grounds, 571 Fed. Appx. 698 (10th Cir. 2014).

2. a. A divided panel of the Second Circuit reached the opposite conclusion in *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). The plaintiff in that case alleged that he was fired for internally reporting accounting fraud.

See *id.* at 149. Again, it was undisputed that the plaintiff did not report the alleged misconduct to the SEC prior to his termination. See *ibid.*

The district court dismissed the plaintiff's claim under the anti-retaliation provision, but the Second Circuit, over a dissent from Judge Jacobs, reversed. See 801 F.3d at 155. The Second Circuit characterized the case as presenting "the recurring issue of statutory interpretation that arises when express terms in one provision of a statute are arguably in tension with language in another provision of the same statute." *Id.* at 146. According to the Second Circuit, this Court "recently encountered a similar issue" in *King*. *Ibid.*

Relying heavily on *King*, the Second Circuit proceeded to consider the scope of the anti-retaliation provision. The court recognized that "there is no absolute conflict between the Commission notification requirement in the definition of 'whistleblower' and the absence of such a requirement" elsewhere in the Dodd-Frank Act. 801 F.3d at 150-151 (citing *Asadi*, 720 F.3d at 627-628). The court contended, however, that there was a "significant tension" between those provisions, and it reasoned that applying the definition of a "whistleblower" to the anti-retaliation provision would leave clause (iii) with an "extremely limited scope." *Id.* at 151. The court suggested that whistleblowers who report alleged misconduct both internally and to the SEC are "likely to be few in number," *ibid.*, and some whistleblowers would not be permitted to report alleged misconduct to the SEC until after they have reported it internally, see *id.* at 151-152.

In light of what it perceived as the "sharply limiting effect of a Commission reporting requirement," the Second Circuit believed that "the question becomes whether Congress intended to add [clause (iii)] * * * only to achieve such a limited result." 801 F.3d at 152. The court

acknowledged that legislative history shed no light on the issue, because clause (iii) was added after the bill passed through committee both in the House and in the Senate. See *id.* at 152-153. The court further acknowledged that "the terms of a definitional subsection are usually to be taken literally * * * [and] applied to all subdivisions literally covered by the definition." *Id.* at 154.

The Second Circuit nevertheless reasoned that "mechanical use of a statutory definition is not always warranted." 801 F.3d at 154 (internal quotation marks and citation omitted). Taking into account the "realities of the legislative process," the court determined that the statute was ambiguous. *Id.* at 154-155. The court "doubt[ed] that the conferees who accepted the last-minute insertion of [clause (iii)] would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition in [Section 78u-6(a)(6)]." *Id.* at 155. For that reason, the court concluded that, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was "oblige[d] * * * to give * * * deference to the reasonable interpretation of the agency charged with administering the statute." 801 F.3d at 155.

Judge Jacobs dissented. He contended that "our obligation is to apply congressional statutes as written" and that the majority's "alteration" of the statutory text "creates a circuit split[] and places us firmly on the wrong side of it." 801 F.3d at 155. In Judge Jacobs' view, the majority's approach "looks here, there and everywhere—except to the statutory text." *Id.* at 158. Judge Jacobs rejected the majority's assertion that clause (iii) would have an unduly narrow scope under the statutory definition of "whistleblower." See *ibid.* But even accepting that assertion, Judge Jacobs reasoned that there was "no support" for the proposition that "when a plain reading of a statutory

provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous." *Ibid.* "The thing about a definition is that it is, well, definitional." *Ibid.*

Finally, Judge Jacobs asserted that *King* "does not do the work the majority needs done." 801 F.3d at 159. In his view, *King* did not work a "wholesale revision of the Supreme Court's statutory interpretation jurisprudence." *Ibid.* Instead, to the extent the Court "departed from the plain statutory text" in *King*, it did so under "most unusual circumstances": namely, "to avoid what it considered the upending of a ramified, hugely consequential enactment." *Ibid.* In any event, Judge Jacobs continued, the Court emphasized in *King* that "categorical guidance as to congressional intent should better be looked for in a more predictable location—*like a definitions section.*" *Id.* at 160 (citing *King*, 135 S. Ct. at 2495). "In our case," Judge Jacobs concluded, "the majority follows the sort of 'winding path of connect-the-dots provisions' that the Supreme Court ridiculed." *Ibid.*[2]

b. Numerous district courts nationwide have reached the same conclusion as the Second Circuit, holding that an individual need not report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Lutzeier* v. *Citigroup Inc.*, Civ. No. 14-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015); *Dressler* v. *Lime Energy*, Civ. No. 14-7060, 2015 WL 4773326, at *16 (D.N.J. Aug. 13, 2015); *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014); *Khazin* v. *TD Ameritrade Holding Corp.*, Civ. No. 13-4149, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014),

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[2] The defendants in *Berman* did not file a petition for a writ of certiorari.

aff'd on other grounds, 773 F.3d 488 (3d Cir. 2014); *Ellington* v. *Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Genberg* v. *Porter*, 935 F. Supp. 2d 1094, 1107 (D. Colo. 2013), aff'd in part on other grounds and dismissed in part, 566 Fed. Appx. 719 (10th Cir. 2014); *Nollner* v. *Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994-995 (M.D. Tenn. 2012).[3]

3. In the decision below, the Ninth Circuit expressly recognized the existence of a circuit conflict on the question presented. App., *infra*, 9a. And it ultimately agreed with the Second Circuit's reasoning in *Berman* and rejected the Fifth Circuit's reasoning in *Asadi*. *Id.* at 9a-10a. In his dissent, by contrast, Judge Owens adopted the reasoning of *Asadi* and of Judge Jacobs' dissent in *Berman*. *Id.* at 11a. There can be no serious dispute, therefore, that there is a substantial circuit conflict on the question presented. That conflict is ripe for the Court's resolution, and further review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a question with significant practical consequences for employers and employees alike. Employees frequently allege misconduct both to the SEC and internally. In 2016 alone, the SEC received over 4,200 reports of misconduct. See SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 1

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[3] Notably, before *Berman* and the decision below, district courts in the Second and Ninth Circuits had reached the same conclusion as the Fifth Circuit in *Asadi*, holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower." See *Davies* v. *Broadcom Corp.*, 130 F. Supp. 3d 1343, 1349-1350 (C.D. Cal. 2015); *Wiggins* v. *ING U.S., Inc.*, Civ. No. 14-1089, 2015 WL 3771646, at *11 (D. Conn. June 17, 2015); *Sarkisov* v. *Stonemor Partners L.P.*, Civ. No. 13-4834, 2014 WL 12644016, at *4 (N.D. Cal. June 25, 2014); *Banko* v. *Apple Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013).

(Nov. 2016) <tinyurl.com/doddfrankreport>. For their part, in 2015, employers received around 1.3 reports of misconduct per 100 employees. See Navex Global, *2016 Ethics & Compliance Hotline Benchmark Report* 4 (2016) <tinyurl.com/navexreport>.

In light of the frequency with which employees allege misconduct, it is not surprising that the question presented here also arises often. As reflected by the enormous number of conflicting decisions in the seven years since the passage of the Dodd-Frank Act, there is pervasive confusion about the scope of the anti-retaliation provision that the lower courts are unlikely to resolve on their own. Numerous commentators have recognized the deepening conflict and the need for this Court's intervention. See, *e.g.*, Janna Mouret, Comment, *Shelter from the Retaliation Storm*, 52 Hous. L. Rev. 1529, 1549 (2015); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 Temp. L Rev. 721, 726 (2014); Joseph C. Toris & Benjamin L. Rouder, *Circuit Split Over Protection Afforded By Dodd-Frank Whistleblower Provision Widens*, Nat'l L. Rev. (Mar. 16, 2017) <tinyurl.com/splitwidens>.

2. If allowed to stand, the decision below, from the Nation's largest circuit, will have pernicious consequences for every publicly traded company. That decision deepens the confusion regarding the relationship between the two primary anti-retaliation protections available to corporate whistleblowers under federal law: the Sarbanes-Oxley Act and the Dodd-Frank Act. As this Court recently observed, those statutes protect different categories of whistleblowers. The Sarbanes-Oxley Act's "protections include employees who provide information to any 'person with supervisory authority over the employee,'" whereas

the anti-retaliation provision of the Dodd-Frank Act "focuses primarily on reporting to federal authorities." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014) (citation omitted).

The Ninth Circuit's decision in this case threatens to upset that balance, essentially rendering obsolete the Sarbanes-Oxley Act's anti-retaliation scheme. That is because the Dodd-Frank Act affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act does not. For example, the Dodd-Frank Act allows whistleblowers to bring a retaliation claim in district court in the first instance. See 15 U.S.C. 78u-6(h)(1)(B)(i). Under the Sarbanes-Oxley Act, however, whistleblowers must exhaust their administrative remedies by filing a complaint with the Department of Labor; the whistleblower may pursue a retaliation claim in federal court only if the Department of Labor does not issue a final decision within 180 days of the filing of the administrative complaint. See 18 U.S.C. 1514A(b)(1). Whistleblowers can seek double backpay under the Dodd-Frank Act, but not under the Sarbanes-Oxley Act. Compare 15 U.S.C. 78u-6(h)(1)(C) (Dodd-Frank Act) with 18 U.S.C. 1514A(c)(2) (Sarbanes-Oxley Act). And the limitations period for Dodd-Frank Act claims is between six and ten years, see 15 U.S.C. 78u-6(h)(1)(B)(iii), whereas the corresponding period under the Sarbanes-Oxley Act is just six months, see 18 U.S.C. 1514A(b)(2)(D).

This case well illustrates the danger that the anti-retaliation provision of the Dodd-Frank Act will effectively supplant its counterpart in the Sarbanes-Oxley Act. Respondent alleged that he was fired for, *inter alia*, making internal reports under the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. Rather than exhausting his administrative remedies as the Sarbanes-Oxley Act requires, how-

ever, respondent proceeded directly to federal court under the Dodd-Frank Act. Nor is respondent the only plaintiff to have taken that approach: the vast majority of the plaintiffs in the dozens of other cases addressing the question presented did the same. See pp. 10-16, *supra*. Absent this Court's intervention, individuals who have not reported alleged misconduct to the SEC will be able to proceed under the Dodd-Frank Act in some circuits (and districts), but not in others. That will undermine the consistency and clarity critical to both employers and employees.

3. This case is an optimal vehicle for considering and resolving such an important question. As a result of the allegations and posture of this case, the question is presented cleanly and squarely. Respondent alleges that he made an internal disclosure protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. If respondent had reported the alleged misconduct to the SEC, he would have qualified as a "whistleblower" eligible to bring an anti-retaliation claim under the Dodd-Frank Act. It is undisputed, however, that respondent reported the misconduct only internally and not to the SEC. *Id.* at 15a. The question presented is thus dispositive of respondent's claim under the Dodd-Frank Act. That question was exhaustively briefed by the parties and the SEC below, and it was the sole question addressed by the court of appeals in its opinion. And by agreement of the parties, the district court recently stayed any further proceedings in the case pending the Court's disposition of this petition. See D. Ct. Dkt. 210 (Apr. 11, 2017).

Finally, there would be no material benefit to additional percolation in the lower courts. The arguments for both sides have been exhaustively developed in the three court of appeals decisions (two with dissents) and the more than two dozen district-court decisions addressing

the question presented. Even if it were otherwise, the pressing need for consistency and clarity in the law would outweigh any benefit from further percolation.

* * * * *

In sum, the Ninth Circuit's decision deepens a widely recognized conflict on the question whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Act extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." That question is an important and recurring one, and this case is the ideal vehicle for resolving it. Further review is undeniably warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2017

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-17352

PAUL SOMERS, Plaintiff-Appellee,

v.

DIGITAL REALTY TRUST INC., a Maryland corporation; ELLEN JACOBS, Defendants-Appellants.

Filed: March 8, 2017

Before: SCHROEDER, WARDLAW, and OWENS, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge.

INTRODUCTION

This appeal presents an issue of securities law that has divided the federal district and circuit courts. It results from a last-minute addition to the anti-retaliation protections of the Dodd-Frank Act ("DFA") to extend protection to those who make disclosures under the Sarbanes-Oxley Act and other laws, rules, and regulations. 15 U.S.C.

§ 78u-6(h)(1)(A)(iii). The underlying issue is whether, in using the term "whistleblower," Congress intended to limit protections to those who come within DFA's formal definition, which would include only those who disclose information to the Securities and Exchange Commission ("SEC"). *See* 15 U.S.C. § 78u-6(a)(6). If so, it would exclude those, like the plaintiff in this case, who were fired after making internal disclosures of alleged unlawful activity.

The Fifth Circuit was the first to weigh in on the question and strictly applied DFA's definition of "whistleblower" to the later anti-retaliation provision, so as to require dismissal of the plaintiff's action in that case because he did not make his disclosures to the SEC. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013). It therefore rejected the SEC's regulation adopting a contrary interpretation. *Id.* at 630.

The Second Circuit, viewing the statute itself as ambiguous, applied *Chevron* deference to the SEC's regulation. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). That regulation, in effect, interprets the provision to extend protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC. 17 C.F.R. § 240.21F-2.

The district court in this case followed the Second Circuit's approach, denied Defendant's motion to dismiss, and certified an interlocutory appeal. We agree with the district court that the regulation is consistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the government. This intent is reflected in the language of the spe-

cific statutory subdivision in question, which explicitly references internal reporting provisions of Sarbanes-Oxley and the Securities Exchange Act of 1934 ("Exchange Act"). In view of that language, and the overall operation of the statute, we conclude that the SEC regulation correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC. We therefore affirm.

BACKGROUND

Plaintiff-Appellee, Paul Somers, was employed as a Vice President by Defendant-Appellant, Digital Realty Trust, Inc. ("Digital Realty"), from 2010 to 2014. According to Somers's complaint in district court, he made several reports to senior management regarding possible securities law violations by the company, soon after which the company fired him. Somers was not able to report his concerns to the SEC before Digital Realty terminated his employment.

Somers subsequently sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Exchange Act. That section, entitled "Securities Whistleblower Incentives and Protection," includes the anti-retaliation protections created by DFA. Digital Realty sought to dismiss the DFA claim on the ground that, because Somers only reported the possible violations internally and not to the SEC, he was not a "whistleblower" entitled to DFA's protections.

The district court, in a published opinion, denied Digital Realty's motion to dismiss the DFA claim. The court conducted an extensive analysis of the statutory text, DFA's legislative history, and the procedural and practical implications of harmonizing the narrow definition of

whistleblower" with the broad protections of the anti-retaliation provision. *Somers v. Dig. Realty Tr. Inc.*, 119 F. Supp. 3d 1088, 1100-05 (N.D. Cal. 2015). The court observed that "[a]t bottom, it is difficult to find a clear and simple way to read the statutory provisions of Section 21F in perfect harmony with one another." *Id.* at 1104. Having analyzed the tension between the definition and anti-retaliation provisions, the district court deferred to the SEC's interpretation that individuals who report internally only are nonetheless protected from retaliation under DFA. *Id.* at 1106. The district court certified the DFA question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), *id.* at 1108, and we subsequently granted Digital Realty's Petition for Permission to Appeal.

DISCUSSION

The case must be seen against the background of twenty-first century statutes to curb securities abuses. Congress enacted the Sarbanes-Oxley Act in 2002, following a major financial scandal. Its purpose was "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014). As a key part of its safeguards, Sarbanes-Oxley requires internal reporting by lawyers working for public companies. *See* 15 U.S.C. § 7245. This is in addition to internal reporting by auditors, which was already mandated by the Exchange Act. *See* 15 U.S.C. § 78j-1(b). Further, Sarbanes-Oxley requires that companies maintain internal compliance systems that include procedures for employees to anonymously report concerns about accounting or auditing matters. *See* 15 U.S.C. § 78-j-1(m)(4), 7262. It also provides protections to these and other "whistleblower" employees in the event that companies retaliate

against them. 18 U.S.C. § 1514A(a). Sarbanes-Oxley expressly protects those who lawfully provide information to federal agencies, Congress, or "a person with supervisory authority over the employee." *Id.*

Like Sarbanes-Oxley, DFA was passed in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008. *See* Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 129-30 (2014) (discussing the mortgage crisis and Congress's response). In enacting DFA, Congress said the main purposes included "promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system" and "protect[ing] consumers from abusive financial services practices." Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). DFA provided new incentives and employment protections for whistleblowers by adding Section 21F to the Securities Exchange Act of 1934. Section 21F defines a whistleblower as, "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). This definition thus describes only those who report information to the SEC.

The anti-retaliation provision in question in this case is found in a later subsection of Section 21F. It provides broad protections and states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment

> because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A). The issue in this case concerns subdivision (iii), which gives whistleblower protection to all those who make any required or protected disclosure under Sarbanes-Oxley and all other relevant laws.

Subdivision (iii) was added after the bill went through Committee. There is no legislative history explaining its purpose, but its language illuminates congressional intent. By broadly incorporating, through subdivision (iii), Sarbanes-Oxley's disclosure requirements and protections, DFA necessarily bars retaliation against an employee of a public company who reports violations to the boss, i.e., one who "provide[s] information" regarding a securities law violation to "a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a). Provisions of Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting. Auditors, for

example, must "as soon as practicable, inform the appropriate level of management" of illegal acts, and only after such internal reporting may auditors bring their concerns to the SEC. 15 U.S.C. § 78j-1(b). Leaving employees without protection for that required preliminary step would result in early retaliation before the information could reach the regulators. As the Second Circuit noted, "[I]f subdivision (iii) requires reporting to the [SEC], its express cross-reference to the provisions of Sarbanes-Oxley would afford an auditor almost no Dodd-Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the Commission, and any retaliation would almost always precede Commission reporting." *Berman*, 801 F.3d at 151. Sarbanes-Oxley likewise requires lawyers to report internally, 15 U.S.C. § 7245, and the SEC's Standards of Professional Conduct set forth only limited instances in which an attorney may reveal client confidences to the SEC, 17 C.F.R. § 205.3(d)(2). The attorney would be left with little DFA protection.

That DFA's definitional provision describes "whistleblowers" as employees who report "to the Commission" thus should not be dispositive of the scope of DFA's later anti-retaliation provision. Terms can have different operative consequences in different contexts. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The use of a term in one part of a statute "may mean [a] different thing[]" in a different part, depending on context. *See id.* at 2493 n.3. This is true even where, as here, the statute includes a definitional provision: "[Statutory d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 228

(2012). DFA's anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally. *See King*, 135 S. Ct. at 2493 n.3. Its terms should be enforced.

Reading the use of the word "whistleblower" in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent. As the Second Circuit pointed out, subdivision (iii) would be narrowed to the point of absurdity; the only class of employees protected would be those who had reported possible securities violations both internally and to the SEC, when the employer—unaware of the report to the SEC—fires the employee solely on the basis of the employee's internal report. *See Berman*, 801 F.3d at 151-52. This reading is illogical. Employees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally. *See id.* Reporting to the SEC brings a higher likelihood of a problem being addressed, along with an increased risk of employer retaliation, whereas internal reporting may be less efficient but safer. *Id.* As we have seen, Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. *Id.* at 152-53. The anti-retaliation provision would do nothing to protect these employees from immediate retaliation in response to their initial internal report. A strict application of DFA's definition of whistleblower would, in effect, all but read subdivision (iii) out of the statute. We should try to give effect to all statutory language. *See Duncan v. Walker*, 174, 121 S. Ct. 2120, (2001) (rejecting a statutory construction that would render a term "insignificant, if not wholly superfluous"); *see*

also Nat. Res. Def. Council, Inc. v. Pritzker, 828 F.3d 1125, 1133 (9th Cir. 2016).

We recognize there is intercircuit disagreement. The Second Circuit in *Berman* disagreed with the Fifth Circuit, which had earlier applied the formal definition of whistleblower to limit the scope of the anti-retaliation provision. *Asadi*, 720 F.3d at 630. The *Asadi* decision reasoned that if DFA protected the same conduct that Sarbanes-Oxley did, then the Sarbanes-Oxley enforcement scheme would be rendered moot or superfluous, on the theory that no one would use it. *See id.* at 628-29. The Fifth Circuit pointed out that Sarbanes-Oxley lacks DFA's double damage provision, has a shorter statute of limitations, and has more extensive administrative requirements. *Id.* But as the SEC has pointed out in its amicus brief in this case, DFA's enforcement scheme is not more protective in all situations and would not swallow Sarbanes-Oxley because Sarbanes-Oxley offers a different process from DFA. Sarbanes-Oxley may be more attractive to the whistleblowing employee in at least two important ways. First, Sarbanes-Oxley provides for adjudication through administrative review, with the Department of Labor taking responsibility for asserting the claim on the whistleblower's behalf. 18 U.S.C. § 1514A (b)(2). This procedure would likely be significantly less costly and stressful for whistleblowers than having to file an action in federal court, pursuant to DFA's enforcement scheme. *See* 15 U.S.C. § 78u-6(h)(1)(B). Second, while DFA provides for awards of double back pay, 15 U.S.C. § 78u-6(h)(1)(C), Sarbanes-Oxley allows employees to recover "all relief necessary to make the employee whole," including compensation for special damages, 18 U.S.C. § 1514A(c). An employee who has suffered more substantial emotional injury than financial harm would likely be

better off with Sarbanes-Oxley's allowance for special damages. *See Jones v. SouthPeak Interactive Corp.*, 777 F.3d 658, 672 (4th Cir. 2015) (joining the Fifth and Tenth Circuits in concluding that emotional distress damages are available under Sarbanes-Oxley as "special damages"). DFA's protection for internal reporting therefore does not render Sarbanes-Oxley's enforcement scheme superfluous. The statutes provide alternative enforcement mechanisms.

For all these reasons, we conclude that subdivision (iii) of section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. We also agree with the Second Circuit that, even if the use of the word "whistleblower" in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference. In 2011, the SEC issued Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2, pursuant to its rule-making authority under 15 U.S.C. § 78u-6(j). The SEC's rule in our view accurately reflects Congress's intent to provide broad whistleblower protections under DFA. The Rule says that anyone who does any of the things described in subdivisions (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection, including those who make internal disclosures under Sarbanes-Oxley. They are all whistleblowers. The Rule is quite direct: "For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if: . . . [y]ou provide that information in a manner described in [the anti-retaliation provision] of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A))." 17 C.F.R. § 240.21F-2.

The regulation accurately reflects congressional intent that DFA protect employees whether they blow the whistle internally, as in many instances, or they report directly to the SEC. The district court correctly so recognized.

The judgment of the district court is **AFFIRMED.**

OWENS, Circuit Judge, dissenting:

I agree with the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013), and Judge Jacobs' dissent in *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145, 155-60 (2d Cir. 2015), and therefore respectfully dissent. Both the majority here and the Second Circuit in *Berman* rely in part on *King v. Burwell*, 135 S. Ct. 2480 (2015), to read the relevant statutes in favor of the government's position. In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level. *Cf. John Carpenter's The Thing* (Universal Pictures 1982).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-14-5180 EMC

PAUL SOMERS, Plaintiff,

v.

DIGITAL REALTY TRUST, INC., *et al.*, Defendants.

Signed: July 22, 2015

AMENDED ORDER DENYING (1) DEFENDANT'S MOTION TO DISMISS; (2) PLAINTIFF'S MOTION TO DISQUALIFY DEFENSE COUNSEL

CHEN, United States District Judge.

I. INTRODUCTION

Plaintiff Paul Somers brought this lawsuit against his former employer, Digital Realty Trust, and Ellen Jacobs, a Senior Vice President at Digital Realty Trust (collectively, Digital Realty, or Defendants). *See* Docket No. 1 (Complaint); *see also* Docket No. 38 (Ellen Jacobs Decl.) at ¶ 2. While Somers' complaint pleads five separate causes of action, including claims for discrimination on the

basis of his sexual orientation and defamation, Digital Realty's current motion to dismiss challenges only one cause of action: that Digital Realty violated the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank, or DFA) where it allegedly terminated Somers' employment in retaliation for his making internal reports of securities law violations. *See* Complaint at ¶¶ 44-51; Docket No. 20 (Motion to Dismiss). Specifically, Digital Realty argues that Somers' Dodd-Frank claim fails as a matter of law because Somers doesn't qualify as a "whistleblower" under the statute.[1] For the reasons explained below, Digital Realty appears mistaken. The Securities and Exchange Commission (SEC, or Commission) has formally issued a rule that clarifies the scope and meaning of the whistleblower protections of Dodd-Frank, and extends the protection of those provisions to individuals like Somers who report suspected violations not to the SEC, but to internal management. Because the Court finds that the SEC's rule is entitled to *Chevron* deference, Digital Realty's motion to dismiss is **DENIED**.

Also pending before the Court is Somers' motion to disqualify Defendants' counsel, Seyfarth Shaw, for a purported conflict of interest. Because Seyfarth Shaw's prior representation of Somers—for a total of 2.1 hours of billable time—is not "substantially related" to its current

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[1] Digital Realty also argued that Somers could not maintain a cause of action for whistleblower retaliation under the Sarbanes-Oxley Act directly because Somers did not exhaust his administrative remedies. Somers states in his opposition brief that he did not plead or intend to bring a Sarbanes-Oxley whistleblower claim, *see* Docket No. 21 at 1, and so Defendants' motion to dismiss any such claim is currently unripe.

successive representation of the Defendants, disqualification is not appropriate. This motion is also **DENIED**.

II. BACKGROUND

A. *Background Relevant to Digital Realty's Motion to Dismiss*

Somers was hired by Digital Realty in July 2010. Complaint at ¶ 10. According to Plaintiff, Digital Realty "operates as a real estate investment trust" that "owns, acquires, develops and manages technology-related real estate." Complaint at ¶ 13.

Somers worked as a Vice President of Portfolio Management at Digital Realty, first in Europe and then in Singapore. *Id.* at ¶¶ 10, 15. In Singapore, Somers reported to Senior Vice President Kris Kumar, who headed up the Asian Pacific region for Digital Realty. *Id.* at ¶ 15. "Shortly before Plaintiff's wrongful termination by Defendant Digital, Plaintiff made complaints to senior management regarding actions by Kumar which eliminated internal controls over certain corporate actions in violation of Sarbanes Oxley." *Id.* at ¶ 22; *see also id.* at ¶ 46 ("Plaintiff complained to Defendant Digital's officers, directors, and/or managing agents that certain of Kumar's activities violated requirements for internal controls established by [] the Sarbanes-Oxley Act of 2002."). According to Somers, Kumar had committed a number of acts of "serious misconduct," including "hiding [] seven million dollars in cost overruns on a development in Hong Kong." *Id.* at ¶ 27.

Somers was fired by Digital Realty on April 9, 2014. According to Somers, he was fired (at least in part) in re-

taliation for internally reporting Kumar's alleged violation(s) of Sarbanes-Oxley or other applicable laws. *See* Complaint at ¶ 50. It is undisputed that Somers never reported Kumar's alleged violations to the SEC or any other outside enforcement agency. *See* Docket No. 21 (Plaintiff's Opposition to Motion to Dismiss) at 2.

B. *Background Relevant to Somers' Motion to Disqualify*

Before going to work for Digital Realty, Plaintiff was represented by a partner at Seyfarth Shaw, Eugene Jacobs.[2] Docket No. 34 (Somers Decl.) at ¶ 2. According to Mr. Jacobs, he gave a presentation on April 20, 2010, to executive clients of "Kensington International, an executive recruiting and placement firm." Docket No. 39 (Eugene Jacobs Decl.) at ¶ 3. At the April 20 presentation, Mr. Jacobs "prepared a standard discussion outline called 'Executive Employment Agreement Issues for Consideration' that contains a general overview of issues and discussion points for things to consider when negotiating executive employment agreements." *Id.* at ¶ 4. A copy of the outline indicates that the topics discussed at the April 20 meeting included how to negotiate a new executive's title with the hiring company, executive benefits, and termination provisions. *Id.* at Ex. A.

Sometime after the presentation, Mr. Jacobs avers that he was contacted by Susan Duda, an executive coach at Kensington International, asking for an additional copy of the discussion handout, "presumably so she could share it with [her client] Mr. Somers." Eugene Jacobs Decl. at

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[2] Mr. Jacobs is not related to Defendant Ellen Jacobs. Ellen Jacobs Decl. at ¶ 10.

¶ 7. Jacobs sent Duda the discussion handout. *Id.* Two days later, Ms. Duda "sent Mr. Somers' resume to me and told me that he may contact me about legal representation. Later that day, Mr. Somers engaged me to provide legal advice regarding his potential employment agreement with Newcastle Limited, a Chicago-based real estate advisor and investor." *Id.* at ¶ 8. According to Mr. Jacobs' time records from April 22, 2010, he spent .8 hours on a "[t]elephone conference [with] P. Somers regarding employment matter issues and strategies." Somers Decl., Ex. A (Bill from Seyfarth Shaw to Somers).

On April 26, Mr. Jacobs contends that Somers "sent me documents that Newcastle had sent him about the position for which he interviewed, including an offer letter template, job description, and summary of employee benefits available to Newcastle employees." Eugene Jacobs Decl. at ¶ 10. Mr. Jacobs' time records indicate that he conducted a 1.3 hour-long telephone conference with Somers that day to "review Newcastle offer letter and related documents; identify issues." Somers Decl., Ex. A. These two telephone conferences, lasting 2.1 hours in total, are the only legal work Jacobs (and Seyfarth Shaw) performed for Somers. *See* Somers Decl. at ¶ 5.

According to Jacobs, he next heard from Somers on April 30, when Somers "advised me that his negotiations with Newcastle had stalled." Eugene Jacobs Decl. at ¶ 11. Somers then "emailed [Jacobs] out of the blue" in June 2010 to tell him "that he had already accepted a position with Digital Realty Trust." Eugene Jacobs Decl. at ¶ 12. According to Jacobs, he "had no input whatsoever in any negotiations, if there were any, or other terms and conditions relating to Mr. Somers' employment with Digital Realty." Jacobs further declares that:

> Mr. Somers never sought any legal advice of any nature from me in connection with the job at Digital Realty, nor did I provide any legal counsel to him regarding Digital Realty in any regard whatsoever. In addition, Mr. Somers did not share any confidential information with me about his job at Digital Realty. My representation of Mr. Somers was limited to advising him on issues relating to the negotiation of an employment agreement with Newcastle.

Id. at ¶ 14. Somers confirms that he "did not ask Mr. Jacobs to negotiate [his] agreement with Digital [Realty]." Somers Decl. at ¶ 2. However, Somers claims that he used "ideas" from Mr. Jacobs' presentation outline "in other subsequent matters," and that he "obtained my job with Digital Realty Trust, Inc. while still in communication with Mr. Jacobs." *Id.* at ¶¶ 2-3. Mr. Somers also claims that he "discussed the Digital Realty opportunity briefly with Mr. Jacobs and informed Mr. Jacobs about some aspects of my approach to obtaining the job with Digital." *Id.* at ¶ 4.

III. DISCUSSION

A. *Defendant's Motion to Dismiss Somers' Dodd-Frank Whistleblower Claim*

Digital Realty moves to dismiss Somers' second cause of action, which alleges that Somers was wrongfully terminated from his employment in retaliation for reporting his supervisor's purported law violations to Digital Realty management. According to Digital Realty, Somers does not qualify as a "whistleblower" under the Dodd-Frank Act because he did not report any alleged law violations to the SEC. Digital Realty also argues in its reply brief that

Somers has not adequately pleaded that his internal reports were either "required or protected" under the Sarbanes-Oxley Act. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii). For the reasons explained below, Digital Realty's first argument is unavailing and its second argument was waived where Digital Realty failed to raise it in its original motion.

1. *Passage of Dodd-Frank and Relevant Statutory Provisions*

Dodd-Frank established a new whistleblower program in 2010 by adding Section 21F to the Securities Exchange Act of 1934 (Exchange Act). *See* Section 21F, codified at 15 U.S.C. § 78u-6. Section 21F "encourages individuals to provide information relating to a violation of U.S. securities laws" through two "related provisions that: (1) require the SEC to pay significant monetary awards to individuals who provide information to the SEC which leads to a successful enforcement action; and (2) create a private cause of action for certain individuals against employers who retaliate against them for taking specified protected actions." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013). Courts frequently refer to the award provision as the "whistleblower-incentive program" and the provision protecting whistleblowers from retaliation as the "whistleblower-protection program." *See id.* at 623 n. 3; *see also Connolly v. Remkes*, No. 5:14-cv-01344-LHK, 2014 WL 5473144, at *4 (N.D. Cal. Oct. 28, 2014). Only the provisions of the whistleblower-protection program are at issue here.

The DFA defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who

provide, information relating to a violation of the securities laws ***to the Commission***, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6) (emphasis added). Dodd-Frank forbids employers from retaliating against whistleblowers, and sets forth specific prohibitions. Specifically the DFA provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter [*i.e.*, the Exchange Act], including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii). The DFA provides that an employee may bring suit against any employer who violates the whistleblower protections codified in Section 21F. *See* 15 U.S.C. § 78u-6(h)(1)(B). Dodd-Frank further provides that "[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section

[*i.e.*, the whistleblower program] consistent with the purposes of this section." 15 U.S.C. § 78u-6(j).

An aggrieved whistleblower under the DFA may also have a claim under the Sarbanes-Oxley Act, which created a civil right of action to protect employees from retaliation for reporting law violations. *See* 18 U.S.C. § 1514A. However, the remedies and procedures associated with a Sarbanes-Oxley Act anti-retaliation claim are considerably different from those provided under the whistleblower-protection provision of the DFA. Three main differences bear highlighting. First, the DFA provides for recovery of two times back pay, whereas Sarbanes-Oxley provides for recovery of back pay without a multiplier, along with other economic damages such as emotional distress damages. *Compare* 15 U.S.C. § 78u-6(h)(1)(C) *with* 18 U.S.C. § 1514A(c)(2); *see also Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (per curiam) (holding that Sarbanes-Oxley "affords noneconomic compensatory damages, including emotional distress and reputational harm"). Second, Sarbanes-Oxley act claimants must first file an administrative complaint with the Department of Labor, whereas DFA plaintiffs are not required to exhaust any administrative remedies. *See* 18 U.S.C. § 1514A(b)(1). And third, DFA claimants have between six and ten years to file suit from the time a violation occurs, whereas Sarbanes-Oxley plaintiffs must file suit between 180 days after the violation occurs and 180 days after the employee becomes aware of the violation. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii); 18 U.S.C. § 1514A(b)(2)(D).

2. *The SEC Issues Rule 21F-2(b)(1) Interpreting the Whistleblower-Protection Provisions*

The SEC issued final rules interpreting and implementing Section 21F of the DFA in June 2011. *See* Securities Whistleblower Incentives and Protections (Adopting Release), 78 Fed. Reg. 34300, 34301-34304 (June 13, 2011). In particular, the SEC issued Exchange Act Rule 21F-2(b)(1), which states that for the purpose of the whistleblower-protection program, "you are a whistleblower if . . .[y]ou provide information in a manner described in . . .15 U.S.C. 78u-6(h)(1)(A)." *See* 17 C.F.R. § 240.21F-2(b)(1).

As noted above, the DFA—and specifically, section 78u-6(h)(1)(A)—"sets forth three types of protected whistleblower activity, the last of which [*i.e.*, subsection (iii)] includes 'making disclosures that are required or protected under the Sarbanes-Oxley Act.'" *Connolly*, 2014 WL 5473144, at *4 (quoting 15 U.S.C. § 78u-6(h)(1)(A)(iii)). "In turn, the Sarbanes-Oxley Act affords whistleblower protection to an employee who gives 'information or assistance' to 'a person with supervisory authority over the employee'" *id.* (quoting 18 U.S.C. § 1514A(a)(1)(C)), or to any other "such person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A(a)(1)(C). That is, Sarbanes-Oxley protects employee disclosures made internally to certain supervisory personnel irrespective of whether the employee separately reports the information to the SEC. Thus, by providing that an individual is a "whistleblower if" they "provide information in a manner described in" subsection (iii) of section 78u-6(h)(1)(A), Rule 21F-2(b)(1) stipulates that the whistleblowing-protection program of the DFA does ***not*** require an employee

to report violations directly to the SEC. *See Connolly*, 2014 WL 5473144, at *4; *Asadi*, 720 F.3d at 629 (refusing to defer to SEC interpretation of the DFA, but explaining that Rule21F-2(b)(1) defines whistleblower "broadly by providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A)"); *see also* Adopting Release at 34304 (explaining that under the SEC rule, "the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission").

3. *SEC Rule 21F-2(b)(1) is Entitled to Deference*

The determinative issue for resolving Digital Realty's motion to dismiss is whether SEC Rule 21F-2(b)(1) is entitled to *Chevron* deference. *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that a court should defer to a responsible executive agency's permissible construction of a statute where the statutory language is ambiguous or otherwise does not speak precisely to the question at issue). If it is entitled to deference, then Somers has pleaded a legally sufficient retaliation claim under Dodd-Frank. For instance, Somers alleges that he was fired in retaliation for "complain[ing] to Defendant Digital's officers, directors, and/or managing agents that certain of Kumar's activities violated requirements for internal controls established by the Sarbanes-Oxley Act of 2002." Complaint at ¶ 46. If, on the other hand, the Commission rule is not entitled to deference, then a fair reading of the DFA requires that Somers must have reported a violation to the SEC in order to have cause of action under the DFA: Since Somers admits that

he did not make a report to the SEC before he was fired, he could not be a whistleblower under the DFA.

a. *Applicability and Legal Standards of Chevron Framework*

"[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1272 (9th Cir. 2015) (holding that *Chevron's* reasonableness standard applies to a "regulation duly promulgated after a notice-and-comment period"). Rule 21F-2(b)(1) was promulgated pursuant to an express provision of the DFA and after a notice-and comment period, and thus qualifies for *Chevron* deference. *See* 15 U.S.C. § 78u-6(j); *see also* Adopting Release at 34300.

However, consideration of whether an agency interpretation is permissible under *Chevron* requires an examination of two steps. First, as a threshold matter, the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If so, then the inquiry is over, and we must give effect to the 'unambiguously express intent of Congress.'" *Navarro*, 780 F.3d at 1271 (quoting *Chevron*, 467 U.S. at 842). But if the statute is silent or ambiguous with respect to the specific issue, the Court must proceed to the second step and determine whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If the agency's interpretation of

the statute "is a reasonable one, this court may not substitute its own construction of the statutory provision," even if the Court believes the provision would best be read differently. *Navarro*, 780 F.3d at 1273 (citation omitted).

b. *Chevron Step One: The Statute is Ambiguous*

Under the first step of *Chevron*, the Court must determine whether the whistleblower-protection provisions of the DFA are ambiguous. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). General cannons of statutory interpretation are particularly helpful in resolving close cases regarding statutory meaning. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 611 (1989). Here, two interpretative cannons are particularly germane to this Court's inquiry, the surplusage cannon, which holds that a "court should give effect, if possible, to every word and every provision Congress used" in the statute, *Asadi*, 720 F.3d at 622, and the harmonious-reading cannon, which provides that a court should "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see generally* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174-183 (1st ed. 2012) (discussing the surplusage and harmonious-reading cannons).

As Judge Koh recently explained, the "large majority"[3] of courts to consider Dodd-Frank's whistleblower-protection provisions have found ambiguity "in the interplay between §§ 78u-6(a)(6) and 78u-6(h)(1)(A)(iii)" and thus have "deferr[ed] to the SEC's interpretation of Dodd-Frank."[4] *Connolly*, 2014 WL 5473144, at *5. To appreciate the tension between these provisions, it is helpful to first examine the overall structure of Section 21F. As quoted in full above, Section 21F(h)(1)(A) prohibits an employer from retaliating against a whistleblower for: (i) "providing information to the Commission in accordance

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[3] The following is a non-exhaustive list of other district courts that have concluded that the DFA is ambiguous and determined that the SEC interpretation of the DFA whistleblower-protection provisions is entitled to deference. *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44 (D. Mass. 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *see also Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4-6 (S.D.N.Y. May 4, 2011) (finding Section 21F of the DFA ambiguous and concluding, without reference to the then-uncodified SEC rule discussed here, that "whistleblower" under the DFA encompasses those who make required internal reports under Sarbanes-Oxley).

[4] As will be discussed below, however, a small minority of courts—including the only appellate court to have ruled on the issue—have held that the language of the DFA is unambiguous and requires a whistleblower to make a report to the SEC in order to qualify for anti-retaliation protection. *See, e.g., Asadi*, 720 F.3d at 629; *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756-57 (N.D. Cal. 2013); *Verfuerth v. Orion Energy Sys., Inc.*, ___ F. Supp. 3d ___, 2014 WL 5682514, at *3 (E.D. Wisc. 2014). The Court respectfully declines to follow these courts' reasoning.

with this section"; (ii) "initiating, testifying in, or assisting in" an investigation or enforcement action of the Commission "based upon or related to such information"; or (iii) "in making disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act (including section 78j-1 of the Exchange Act), 18 U.S.C. § 1513(e), or "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii). As the statutory language makes plain, subsections (i) and (ii) protect individuals from retaliation for whistleblowing to the Commission about securities law violations. Subsection (iii), however, appears to afford much broader protection, prohibiting retaliatory acts against employees who make much more varied types of disclosures, such as disclosures of securities law violations to an immediate supervisor at their company or to the board of directors. *See* 18 U.S.C. § 1514A(a)(1)(C) (protecting certain disclosures regarding securities laws violations made to individuals with "supervisory authority" over the reporting employee); 15 U.S.C. § 78j-1 (requiring certain disclosures regarding illegal acts to be made to the board of directors).

The tension arises when one considers the definition of a "whistleblower" as codified in Section 21F(a)(6). The DFA only provides anti-retaliation protection to "a whistleblower in the terms and conditions of employment," and Section 21F(a)(6) defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws ***to the Commission***." 15 U.S.C. § 78u-6(a)(6) (emphasis added). As a number of courts have recognized, Section21F(h)(1)(A)(iii) appears to be "'in direct conflict with the DFA's definition of a whistleblower because [subsection (iii)] provides protection to persons who have not disclosed information to the

SEC,'" while Section21F(a)(6) requires the person report to the Commission. *Khazin*, 2014 WL 940703, at *6 (quoting *Genberg*, 935 F. Supp. 2d at 1106); *see also Connolly*, 2014 WL 5473144, at *6 (finding statutory ambiguity given the conflict between the DFA provisions). Put differently, the majority of courts to consider the issue have found that subsection (iii) "would be ineffective if whistleblowers must report directly to the SEC." *Connolly*, 2014 WL 5473144, at *6.

Digital Realty's arguments that there is no ambiguity or conflict in the DFA—which essentially parrot the arguments made by those courts that have concluded similarly—are not entirely persuasive. The first argument is that because the "whistleblower" definition in Section 21F(a)(6) is plain and unambiguous, the plain language of that definition must control over any putatively conflicting statutory text that appears later in Section 21F. *See Asadi*, 720 F.3d at 623-24 (holding that there can "only be one category of whistleblower" under the DFA given the "plain language and structure" of the Act); *see also Banko*, 20 F. Supp. 3d at 756 (holding that "the statute specifies that an employer may not [retaliate] against a *whistleblower*. It is not until after this clause that Congress adds protection for reports that are protected by Sarbanes-Oxley, indicating that the latter is subordinate to the former") (emphasis in original).

In support of the argument that a clear definitional term must control, the *Asadi* court cites to the Scalia & Garner treatise, which states that "[w]hen . . . a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." Scalia & Garner, *supra*, at 226 (emphasis in original). But just two pages later, the very same treatise recognizes that while

a statutory definition provides a "very strong indication" of a term's meaning, it is "nonetheless one that can be contradicted by other indications. So where the artificial or limited meaning would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two, the normal meaning should be applied." *Id.* at 228. Indeed, just two terms ago the Supreme Court concluded that an express and clear definitional term in a statute may ultimately need to yield to countervailing interpretative factors in order to harmonize the meaning of a statute. *See Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). In *Bond*, the Court considered whether a criminal prohibition codified in the Chemical Weapons Convention Implementation Act of 1998 could apply to a defendant whose "amateur attempt . . . to injure her husband's lover" with common chemicals resulted in the victim suffering a "minor thumb burn readily treated by rinsing with water." *Id.* at 2083. The defendant had been convicted under statutory language that rendered it unlawful for any person to knowingly "use . . . any chemical weapon."[5] *Id.* at 2086; *see also* 18 U.S.C. § 229(a). Despite the statute's clear definition of "chemical weapon," and despite the fact that the defendant had obviously used a "chemical weapon" with the necessary *mens rea*, the Court reversed the defendant's conviction. *Bond*,

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[5] "Chemical weapon" was defined in relevant part as "[t]oxic chemicals and their precursors . . ." where "toxic chemical" was in turn defined as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Bond*, 134 S. Ct. at 2085. As the Court noted, the ordinary reading of the relevant statutory language would "render the statute striking in its breadth and turn every kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Id.* at 2086 (internal quotation marks and citation omitted).

134 S. Ct. at 2091. Specifically, the majority held that "chemical weapon" could not be given its defined meaning because doing so would violate other principles of statutory interpretation—namely the "background assumption that Congress normally preserves the constitutional balance between the National Government and the States." *Id.* at 2091. (citation omitted); *see also id.* at 2097 (Scalia, J. dissenting) (recognizing that a court may ignore the unambiguous words of a statutory definition in the rare case where doing so will interpret the "words fairly, in light of their statutory context").

Indeed, just this Term the Court again found contextual ambiguity in what otherwise appeared to be seemingly clear statutory language. *See Yates v. United States*, 135 S. Ct. 1074 (2015). In *Yates*, the defendant had been convicted of violating a provision of Sarbanes-Oxley that prohibited the destruction of a "tangible object" with the intent to obstruct a law enforcement investigation. *Id.* at 1079. The Court noted that "although dictionary definitions" of terms such as "tangible object" should "bear consideration, they are not dispositive. . . ." *Id.* at 1082. The Court ultimately reversed Yates' conviction—obtained after he destroyed what was indisputably a "tangible object" (fish) with the requisite intent—because the majority concluded that the term "tangible object" in the relevant provision of Sarbanes-Oxley could not be given its dictionary definition in light of the "specific context in which that language is used," including the historic origins and legislative purpose of the law. *Id.* at 1082; *see also United States v. Carroll*, No. CR-13-566 EMC, 2015 WL 2251206 (N.D. Cal. May 13, 2015) (discussing *Yates*).

As both *Bond* and *Yates* demonstrate, a court may decline to strictly apply a definitional term in a statute, or

otherwise adopt the plain and ordinary meaning of statutory language, where other tools of statutory interpretation strongly suggest such a result. According, just because Section 21F expressly defines the term "whistleblower" to require a report to the SEC does not mean that the plain language of that definition *must* control in the face of arguably conflicting statutory language or other persuasive indications of legislative intent. *See generally Bond*, 134 S. Ct. at 2091.

In determining whether the DFA's definition of "whistleblower" itself compels the outcome in this case, the Court must consider the "specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Digital Realty argues that there is no conflict between the provisions of the DFA which would render the statute ambiguous, and thus there is no reason to defer to the SEC's interpretation of the statute. For the reasons explained below, the Court disagrees.

i. *The Whistleblower Definition Would Render Subsection (iii) Superfluous Because That Definition Conflicts with Various Provisions of Subsection (iii) Which Clearly Contemplate Only Internal Reports, and not Reports to the SEC*

As noted above, the broad language of subsection (iii) is arguably in tension with the narrower definition of a whistleblower contained in Section 21F(a)(6). As Judge Koh observed in *Connolly*, subsection (iii) would be rendered meaningless by the strict application of the definition of "whistleblower" under the DFA because subsection (iii) appears to contemplate a broad scope of protec-

tion for individuals who do *not* make reports to the Commission. *Connolly*, 2014 WL 5473144, at *6. A number of courts are in accord. *See* footnote 3, *supra*.

Despite the fact that a number of courts have found that subsection (iii) of the DFA "would be ineffective if whistleblowers must report directly to the SEC," *Connolly*, 2014 WL 5473144, at *6, the Fifth Circuit has held that the restrictive definition of "whistleblower" articulated in Section 21F(a)(6) does not render Section 21F(h)(1)(a)(iii) superfluous. *Asadi*, 720 F.3d at 626. In support of this argument, the Fifth Circuit posited a hypothetical situation whereby the whistleblower protections of Section 21F(h)(1)(a)(iii) could have effect if an employee both internally reported securities law violations to his employer and to the SEC:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd-Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory

> authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes-Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd-Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.

Id. at 627-28.

Digital Realty's reliance on *Asadi* is misplaced. While the Court assumes, without deciding, that the above hypothetical posited in *Asadi* actually presents one situation where sections 21F(a)(6) and 21F(h)(1)(A)(iii) could be applied in harmony such that the latter section would not be superfluous,[6] the Court finds there are other points of tension between these two provisions.

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[6] The Court notes that the SEC has taken the position in various other litigations that the Fifth Circuit hypothetical is flawed because "[w]hether an individual's disclosures constitute a 'protected activity' under the Fifth Circuit's narrow reading of clause (iii) would turn on whether the individual has made a separate disclosure to the Commission. The Commission contends that if the employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in a protected activity." *See* Br. of the Sec. & Exch. Comm'n at 23, *Safarian v. American DG Energy Inc.*, No. 14-2734, 2014 WL 7240193 (3d Cir. Dec. 11, 2014) (SEC Amicus Br.). However, under the Fifth Circuit's hypothetical, the defendant

There are a number of provisions in subsection (iii) that conflict with the assumption that only those who report to the SEC enjoin the whistleblowing protection of the DFA. For instance, subsection (iii) expressly protects a whistleblower who makes required or protected disclosures under section 78j-1 of the Exchange Act. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii). Section 78j-1(b), entitled "Required response to audit discoveries," provides that an individual conducting an audit of a public company must, under certain circumstances, "inform the appropriate level of the management of the issuer . . . [of] illegal acts that have been detected or have otherwise come to the attention" of the auditor "unless the illegal act is clearly inconsequential." 15 U.S.C. § 78j-1(b)(1)(B). Section 78j-1 further requires that if the company (*i.e.* "issuer") does not take reasonable "remedial action" after receiving such a report of illegal acts, an auditor must "directly report its conclusions to the board of directors" of the corporation. 15 U.S.C. § 78j-1(b)(2). Critically, section 78j-1 only *permits* an auditor to report such "illegal acts" to the SEC *if* the board of directors or other internal management fails to take appropriate remedial action. *See* 15 U.S.C § 78j-1(b)(3)(B) (providing that an auditor may either resign or report putative law violations to the SEC where management fails to appropriately respond to an internal report of such violations). That is, section 78j-1 clearly requires internal reporting of illegal acts, and does not contemplate any report of such acts to the SEC, except in limited circumstances. Congress's express mention of section 78j-1

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would have the intent to retaliate because of the employee's complaint to management; the concurrent complaint to the SEC is not the purported basis of the retaliatory intent but serves the satisfy the gatekeeping function of Section 21(a)(6)'s definition of "whistleblower" entitled to DFA's remedies.

in subsection (iii) of the Dodd-Frank whistleblower protection provision would seem to indicate that Congress wished to cover auditors who made required internal reports about illegal acts. Yet if this Court is required to limit the DFA's protection to those who report to the SEC, nearly all of the conduct "required" under section 78j-1 and its scheme of internal reports would be undermined.

As another example, subsection (iii) clearly covers internal reports required of attorneys under Sarbanes Oxley. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (prohibiting retaliation for disclosures that are "required or protected under the Sarbanes-Oxley Act"). 15 U.S.C. § 7245 requires attorneys to "report evidence of a material violation of securities law ... or similar violation[s] by the company ... to the chief legal counsel or the chief executive officer of the company." 15 U.S.C. § 7245(1). Congress has further required attorneys to report such evidence "to the audit committee of the board of directors ... or to another committee of the board of directors" if "the counsel or officer does not appropriately respond to the evidence." 15 U.S.C. § 7245(2). Similar to Section 78j-1, Sarbanes-Oxley requires attorneys to report certain law violations internally up the chain of command. Indeed, a later-enacted SEC rule provides that attorneys must first report violations internally *before* any eventual report can be made to the SEC, because "[b]y communicating [evidence of a material violation] to the issuer's officers or directors, an attorney does not reveal client confidences or secrets privileged or otherwise protected ... related to the attorney's representation of an issuer." 17 C.F.R. § 205.3(b)(1). The SEC rule specifically contemplates that attorneys will *not* externally report law violations to the Commission unless a number of preconditions are satisfied. *See* 17 C.F.R.

§ 205.3(d)(2)(i)-(ii). Indeed, external reports may be prohibited by attorney ethics rules.[7] Applying the narrow definition of "whistleblower" from Section 21F(a)(6) to attorneys who have made required internal reports under Sarbanes-Oxley would leave such lawyers largely (if not entirely) unprotected from retaliation under the DFA.

In light of these examples, Section 21F(a)(6)'s narrow definition of whistleblower cannot easily be reconciled with Section 21F(h)(1)(A)(iii)'s seemingly expansive scope, which appears to cover conduct under statutes that expressly *require* internal whistleblowing activity to occur before an individual may even consider making a voluntary report to the SEC.

ii. *The Whistleblower Definition Would Render the Words "To The Commission" in Subsections (i) and (ii) Superfluous*

Digital Realty (and *Asadi*'s) next argument—that reading the DFA to apply to employees who do not make a report to the SEC would read the words "to the Commission" out of the statutory definition of a whistleblower—is not dispositive. *See Asadi*, 720 F.3d at 625; *Banko*, 20 F. Supp. 3d at 756. While it is true that the SEC's Rule does effectively read the words "to the Commission" out of the definition of whistleblower as Section

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[7] The Court notes that there has been some controversy between the SEC and certain State Bar Associations, which have argued that an attorney may not report to the SEC without client consent, and that attorneys may be subject to discipline for complying with 17 C.F.R. § 205.3. *See generally The New World of Risk for Corporate Attorneys and Their Boards Post-Sarbanes-Oxley: An Assessment of Impact and a Prescription for Action*, 2 Berkeley Bus. L.J. 185, 205-2010 (2005).

21F(a)(6) would apply to (iii), Digital Realty's interpretation itself would create surplusage in subsections (i) and (ii). Section 21F(h)(1)(A) prohibits retaliation against a "whistleblower," which is defined in Section 21F(a)(6) as an "individual who provides . . . information relating to a violation of the securities laws to the Commission." 15 U.S.C. § 78u-6(a)(6). But applying this limited definition of whistleblower would render superfluous the phrase "to the Commission" in subsections (i) and (ii). For instance, subsection (i) prohibits retaliating against a whistleblower "in providing information to the Commission in accordance with this section." 15 U.S.C. § 78u-6(h)(1)(A)(i). This subsection would be entirely unnecessary if, as Digital Realty and the *Asadi* court contend, only persons who provide information to the Commission can ever be whistleblowers. As the Supreme Court has noted, "the cannon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'Ship*, 131 S. Ct. 2238, 2248 (2011) (internal quotation marks and citation omitted). Here, no interpretation appears to avoid excess language.

iii. *The Wording of Sections (i) and (ii) as Compared to (iii) and the Legislative History of the DFA Further Supports a Finding of Ambiguity*

Moreover, subsections (i) and (ii) expressly refer to providing information or testimony to the Commission, while (iii) makes no similar reference to the Commission. The difference in language, wherein the key qualification articulated in (i) and (ii) is omitted from (iii), suggests a legislative intent that (iii) not be read to require SEC reporting. *See Sebelius v. Auburn Regional Med. Cntr.*, 133 S. Ct. 817, 825 (2013) ("We have recognized, as a general

rule, that Congress's use of 'certain language in one party of the statute and different language in another' can indicate that 'different meanings were intended.'") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

Indeed, this construction accords with the legislative history. Subsection (iii) was added to the DFA at the very last minute. Indeed, subsection (iii) never appears in any version of DFA until it formally passed, nor does it appear to have ever been discussed in the legislative record. *See, e.g.*, H.R. 4173, 111th Congress (May 27, 2010; Public Print) (last version of Dodd-Frank before passage did not contain relevant subsection). The conflict between the newly-added (and very broad) subsection (iii) and the narrow whistleblower definition that was consistently present in every version of the bill from its first introduction in Congress, *see* H.R. 4173, 111th Congress (Dec. 2, 2009), could well have been a legislative oversight. And given the belated addition of subsection (iii), it is at least reasonable to assume that Congress intended for the scope of the DFA whistleblower-provisions to be broader than in earlier versions of the bill, which versions unambiguously required an external report to the Commission in order to be protected from employer retaliation. *See, e.g.*, H.R. 4173, 111th Congress (May 27, 2010; Public Print) (report to Commission unambiguously required under penultimate draft of Dodd-Frank). Certainly, the legislative history contains no indication, apart from the definition of whistleblower itself, that Congress purposefully intended to limit whistleblower protections under (iii) solely to those making reports to the Commission. *See Bond*, 134 S. Ct. at 2091 (even express statutory definitions may be overridden in appropriate circumstances).

iv. *The Fifth Circuit's Concerns Regarding Rendering the Sarbanes-Oxley Act Anti-Retaliation Provisions "Moot" are Unfounded*

The *Asadi* court also contends that an expansive reading of the Dodd-Frank whistleblower protection provisions would render the Sarbanes-Oxley "anti-retaliation provision, for practical purposes, moot." *Asadi*, 720 F.3d at 628. According to the Fifth Circuit, an expansive construction "has this impact because an individual who makes a disclosure that is protected by the SOX anti-retaliation provision could also bring a Dodd-Frank whistleblower protection claim on the basis that the disclosure was protected by SOX." *Id.* But such an individual would be unlikely to file suit under Sarbanes-Oxley *Asadi* tells us, because Dodd-Frank "provides for greater monetary damages," has a longer limitations period, and does not require administrative exhaustion with the Department of Labor before filing suit in federal court. *Id.* at 629. This Court disagrees.

The Fifth Circuit overlooked two reasons why individuals might choose to file a claim under Sarbanes-Oxley's whistleblower provisions, either in addition to, or in place of, a DFA claim. First, certain individuals may actually prefer the administrative forum provided by SOX, especially given that OSHA assumes responsibility for investigating and presenting a retaliation claim under Sarbanes-Oxley. *See, e.g.*, 29 C.F.R. § 1980.104-1980.105 (providing that OSHA, rather than the plaintiff, will investigate Sarbanes-Oxley whistleblower claims in the first instance and present its findings to an administrative law judge). Second, while the DFA provides greater back pay than is allowable under SOX, a plaintiff who prevails under SOX can obtain other types of monetary damages not

available under the DFA. For instance, a winning SOX plaintiff can recover damages for noneconomic harms such as emotional distress and reputational harm. *See* 18 U.S.C. § 1514A(c)(2)(C); *Halliburton*, 771 F.3d at 266 (holding that "the statute affords noneconomic compensatory damages, including emotional distress and reputational harm"). Put simply, there is no reason to suspect that a broad reading of the DFA will put an end to Sarbanes-Oxley whistleblower actions, even if such a consideration were relevant at *Chevron* step-one.

v. *Policy Reasons Support a Finding of Ambiguity*

Because this Court believes that the language of the DFA whistleblower-protection provision is at least somewhat in conflict, it is relevant to observe that the Fifth Circuit's resolution of that conflict—reading subsection (iii) narrowly to require a report to the Commission—seems at odds with public policy underlying the DFA. As Judge Koh has noted, the Fifth Circuit's reading of the law is entirely "contrary to Dodd-Frank's purpose of encouraging reporting of securities violations" and otherwise improving accountability in the financial system. *Connolly*, 2014 WL 5473144, at *5; *see also* Pub. L. 11-203, H.R. 4173 (stating that a main purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system"). Moreover, reading subsection (iii) to require a report to the SEC would render the statute "utterly ineffective as a preventive measure because employers would not know that a report was made to the Commission." *Id.* at *6. As the SEC has explained in an amicus brief, "because in [the Fifth Circuit's posited scenario] employers would not know that a report was made to the Commis-

sion, clause (iii) would have no appreciable effect in deterring employers from taking adverse employment action for internal reports or the other disclosures listed in clause (iii)." SEC Amicus Br. at 22. Put simply, requiring SEC reporting adds nothing to the policy of deterring employer retaliation.

vi. *Summary*

At bottom, it is difficult to find a clear and simple way to read the statutory provisions of Section 21F in perfect harmony with one another. While *Asadi*'s interpretation of the statute is not unreasonable, neither is the countervailing interpretation rendered by a number of district courts. The issue before this Court is not the preferable interpretation, but whether the statute is ambiguous. The Court finds there is sufficient ambiguity to open the door to administrative interpretation and invocation of *Chevron* deference to the SEC's interpretative regulation. *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-66 (2007) (affording *Chevron* deference to agency interpretation because where two statutory provisions present "seemingly categorical—and, at first glance, irreconcilable—legislative commands" there is a "fundamental ambiguity that is not resolved by the statutory text"). The relevant "portions of Dodd-Frank are—at a minimum—susceptible to more than one interpretation when read together." *Connolly*, 2014 WL 5473144, at *6; *see also Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013) ("When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous."). For all of the reasons explained above, the

Court concludes that the DFA provisions are ambiguous, and thus will proceed on to consider *Chevron* step-two.

4. *Chevron Step-Two: The SEC Rule is Entitled To Deference*

Given that the whistleblower protection provisions of the DFA are ambiguous, the next question this Court must decide is whether SEC Rule 21F-2(b)(1) is a "permissible construction of the statute." *Connolly*, 2014 WL 5473144, at *6 (quoting *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013)). As every court that has considered *Chevron* step-two has concluded, the answer to that question is "yes." *See id.* ("The SEC's interpretation is a reasonable position that most other courts have adopted"); *see also Khazin*, 2014 WL 940703, at *6 (holding that "the SEC's rule is a permissible construction of the statute and warrants judicial deference"); *Murray*, 2013 WL 2190084, at *5 (holding that "the SEC's interpretation is a reasonable one").

First, the SEC's interpretation is reasonable because it effectively eliminates the tension between the narrow definition of whistleblower in Section 21F(a)(6) and the seemingly very broad coverage of subsection (iii). Put simply, the SEC's interpretation is reasonable because it permits a large class of individuals to qualify as protected whistleblowers, a result which appears consistent with the broad language Congress employed in subsection (iii).

Second, the SEC's interpretation is reasonable because it "comports with Dodd-Frank's scheme to incentivize broader reporting of illegal activities." *Connolly*, 2014 WL 5473144, at *6; *see also Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sep. 25, 2012) (explaining that the DFA "appears to have

been intended to expand upon the protections of Sarbanes-Oxley"); Pub. L. 11-203, H.R. 4173 (stating that a main purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system").

Third, the Court finds the SEC's interpretation is reasonable because it encourages internal reporting of possible law violations. As the SEC persuasively explained in an amicus brief, Rule 21F-2(b)(1) establishes parity between individuals who first report to the SEC and those who first report internally, thereby avoiding a "two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances, and, thus, jeopardize the benefits that can result from internal reporting." SEC Amicus Br. at 28; *see also* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010) (expressing concern that overly incentivizing external reporting would "reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws"); *id.* at 70516 (expressing concern that the Commission will "incur costs to process and validate" whistleblower "tips of varying quality" if companies are not allowed "to investigate and respond to potential securities laws violations prior to reporting them to the Commission"); Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 Fordham L. Rev. 1245, 1250 (2009) (arguing that "internal protections are particularly crucial in view of research findings that . . . employees are more likely to choose internal reporting systems").

Finally, the Court finds the SEC's interpretation is reasonable because it enhances the Commission's ability to bring enforcement actions against employers that engage in retaliatory conduct. As the SEC has stated, a narrow reading of Dodd-Frank would "significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action." SEC Amicus Br. at 29; *see also Connolly*, 2014 WL 5473144, at *6.

Put simply, Rule 21F-2(b)(1) appears to be a reasonable interpretation of Dodd-Frank's whistleblower-protection provisions, and thus is entitled to deference.

5. *Digital Realty's Remaining Argument is Waived*

In its reply brief, Digital Realty argues for the first time that Somers' retaliation claim must fail because he did not adequately allege that his internal reports were "protected" under Sarbanes-Oxley and thus he cannot claim under subsection (iii). Specifically, Digital Realty argues that because Somers did not exhaust his administrative remedies to bring a whistleblower claim under Sarbanes-Oxley directly, his disclosures were not "protected" under Sarbanes-Oxley, and thus the DFA does not apply irrespective of whether Somers could have qualified as a "whistleblower." *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (DFA prohibits retaliation against an individual who makes "disclosures that are required or protected under the Sarbanes-Oxley Act").

Because Digital Realty did not make this argument in its initial motion to dismiss, the argument is waived. *See Dytch v. Yoon*, No. C 10-02915 MEJ, 2011 WL 839421, at *3 (N.D. Cal. Mar. 7, 2011) (explaining that parties "cannot raise a new issue for the first time in their reply

briefs"); *see also United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006) (recognizing the general principle that arguments raised for the first time in a reply brief are waived). Digital Realty's motion to dismiss Somer's DFA claim is denied.

B. *Plaintiff's Motion to Disqualify Defendants' Counsel*

Plaintiff's motion to disqualify Defendants' counsel, Seyfarth Shaw, must similarly be denied. "[W]e apply state law in determining matters of disqualification." *In re Cnty. of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). Rule 3-310 of the California Rules of Professional Conduct provides that a member of the bar "shall not, without the informed written consent of each client . . . [a]ccept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict." Cal. Rules of Prof. Conduct 3-310(C)(2). Where the potential conflict arises from the successive representation of clients with potentially adverse interests, as it does here, "the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." *Flatt v. Super. Ct.*, 9 Cal.4th 275, 283 (1994) (emphasis omitted). "Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations." *Id.* (emphasis in original).

Under the substantial relationship test, disqualification "turns on two variables: (1) the relationship between the legal problem involved in the former representation

and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 709 (2003). "[D]isqualification will depend upon the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation." *Id.* At bottom, "successive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Id.* at 713.

Here, the substantial relationship test is plainly not met. Somers hired Eugene Jacobs, a partner at Seyfarth Shaw, to provide 2.1 hours of legal work related to his efforts to secure a position at Newcastle Limited, a Chicago-based real estate advisor and investor. *See* Eugene Jacobs Decl. at ¶ 8. Somers admits that Jacobs did not advise him with regards to his employment contract with Digital Realty. Somers Decl. at ¶ 2. Somers vaguely claims that he "discussed the Digital Realty opportunity briefly with Mr. Jacobs and informed Mr. Jacobs about some aspects of my approach to obtaining the job with Digital," but even if this were true,[8] it would not demonstrate that "infor-

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[8] Jacobs denies Somers' vague allegations: "Mr. Somers never sought any legal advice of any nature from me in connection with the job at Digital Realty, nor did I provide any legal counsel to him regarding Digital Realty in any regard whatsoever. In addition, Mr.

mation material to . . . accomplishment of the former representation . . . is also material to the . . . accomplishment of the current representation." *Jessen*, 111 Cal. App. 4th at 713. At best, Jacobs provided Somers with advice regarding how to best negotiate an executive agreement, advice that Somers later used when negotiating with Digital Realty. The information that would have passed from Somers to Jacobs in order to "evaluate" or "accomplish" this prior representation has absolutely nothing to do with the "evaluation, prosecution, settlement or accomplishment of the current representation," where Seyfarth Shaw is defending Digital Realty against claims of discrimination, whistleblower retaliation and defamation. Plaintiff's disqualification motion is therefore denied.

IV. CONCLUSION

Defendants' motion to dismiss is denied because Somers has pleaded sufficient facts to establish a plausible claim that he is a whistleblower under the Dodd-Frank Act. An external complaint to the SEC is not required under Rule 21F2-(b)(1), and that rule is entitled to *Chevron* deference. The Court finds, and hereby certifies pursuant to 28 U.S.C. § 1292(b), that this aspect of the Court's order is appropriate for interlocutory appeal, as the issue presented "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*; *see also* Docket No. 61 (Order granting Defendants' request

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Somers did not share any confidential information with me about his job at Digital Realty. My representation of Mr. Somers was limited to advising him on issues relating to the negotiation for an employment agreement with Newcastle." Eugene Jacobs Decl. at ¶14.

to certify for interlocutory appeal, and explaining this Court's reasoning).

Plaintiff's motion to disqualify Seyfarth Shaw is denied because Seyfarth's short representation of Somers is wholly unrelated—let alone substantially so—to Seyfarth's current representation of Digital Realty.

This order disposes of Docket Nos. 20 and 31.

IT IS SO ORDERED.

Dated: July 22, 2015

/s/ Edward M. Chen
EDWARD M. CHEN
United States District Judge

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PARTIES TO THE PROCEEDING BELOW

Petitioner is Digital Realty Trust, Inc., the defendant-appellant below. Ellen Jacobs is a defendant below but was not named as a defendant on the claim under review.

Respondent is Paul Somers, the plaintiff-appellee below.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

According to petitioner, this case presents a "straightforward conflict" on an "important and recurring question involving the interpretation of the Dodd-Frank Act." Pet. 9.[1] In the main, petitioner is correct. The issue is admittedly important and recurring, and the courts of appeals are indeed divided over this issue. Compare *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), with *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015) (rejecting *Asadi*), and Pet. App. 1a-11a (agreeing with *Berman*).

[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. 78u-6.

But for multiple reasons, petitioner is still wrong that this case warrants further review. First, the circuit conflict is shallow and may ultimately resolve itself. The Fifth Circuit was not only the first circuit to resolve the issue, but the *only* circuit to do so without the benefit of the SEC's direct participation. There is accordingly *no* split (2-0) in the courts of appeals where the panel had the benefit of hearing directly from the expert agency tasked with administering this particular statute.

The Fifth Circuit's reasoning has since been roundly criticized by a majority of lower courts, and the SEC has carefully articulated a host of reasons that the Fifth Circuit erred. Other circuits will soon have an opportunity to consider the issue; if they continue following the majority view, there is every reason to believe the Fifth Circuit will reconsider the question at the appropriate time.

Moreover, the benefit of additional percolation easily outweighs the small cost of delay. There is no dispute that petitioner's alleged conduct violates federal law; the only question is whether it violates *two* separate statutes instead of one. The decision below accordingly will not disturb any legitimate business practices or settled expectations. Public companies, under the view of all sides to the case, are forbidden from retaliating against parties for reporting violations via internal schemes. Any company that avoids violating Sarbanes-Oxley[2] will also avoid violating Dodd-Frank. That is hardly a situation calling out for immediate review.

This case also represents an imperfect vehicle for resolving the question presented. It arises in an interlocutory posture, and it can arise again, if necessary, upon final judgment. More importantly, the case also faces an

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[2] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746; 18 U.S.C. 1514A.

unresolved jurisdictional problem. In the proceedings below, petitioner maintained that respondent's failure to exhaust administrative remedies under Sarbanes-Oxley—the Act under which he was *not* suing—deprived the court of jurisdiction to resolve his actual claim under Dodd-Frank. While respondent believes petitioner's argument is baseless, the lower courts failed to address it. If the issue is truly jurisdictional, the Court would be obligated to resolve it before reaching the question presented. That impediment alone is a sufficient basis for denying review.

Finally, further review is unwarranted because the decision below is correct. Petitioner jumps immediately into construing the statute without acknowledging the SEC's paramount authority in this area. Congress expressly charged the SEC to administer this provision, and (as the split above shows) the statute is at a minimum ambiguous. Since no one genuinely disputes that the SEC's regulation is unreasonable, it should control under settled principles of administrative deference. And the SEC's construction is not only reasonable but correct: petitioner's view would render entirely insignificant a critical anti-retaliation safeguard, and do so in a way that would upset the proper operation of both Dodd-Frank and Sarbanes-Oxley.

The SEC has carefully balanced the competing interests in this area, and resolved the question presented in a manner that is consistent with the statute and advances Congress's intent. Its authoritative construction controls, and petitioner's contrary position is mistaken. The petition should be denied.

ARGUMENT

A. The Circuit Conflict Is Shallow And May Ultimately Resolve Itself

According to petitioner, there is a "substantial" circuit conflict, and the case is ripe for immediate review. Pet. 16.

But this "substantial" conflict is limited to a 2-1 split among three circuits; the only circuit to side with petitioner (the Fifth) went first, before the other two circuits emphatically rejected its position—including by calling out considerations the Fifth Circuit simply overlooked. Moreover, the SEC did not participate in the Fifth Circuit (but did in the other circuits), so there is no split at all in cases directly involving the agency tasked with enforcing the statute. There accordingly is good reason to believe the Fifth Circuit will reconsider its position, especially if additional circuits continue lining up against it.

Nor is there any real urgency in resolving this question. Petitioner says that the decision below will have "pernicious consequences" for public companies. Pet. 17. Yet it is undisputed that petitioner's alleged conduct violates federal law; the only question is whether relief is available under *two* statutes, rather than one. The same substantive conduct is prohibited either way, and petitioner's behavior should be the same no matter how this case is resolved. Indeed, it will face *no* consequences, pernicious or otherwise, so long as it stops illegally retaliating against internal whistleblowers. It surely can tolerate a short period of additional percolation to provide a reasonable opportunity for the Fifth Circuit to revisit the issue, or for the political branches to weigh in (if they deem it necessary). Further review at this time is unwarranted.

1. According to petitioner, this case presents a "clear and intractable" circuit conflict. Pet. 3. But while the existing conflict is admittedly clear, it is hardly intractable. The Fifth Circuit went first in deciding this issue, and it failed to consider material points undermining its position. It further acted without the benefit of the SEC's direct participation, which might have avoided the Fifth Circuit's error. The Second and Ninth Circuits, with the SEC's expert input, did not merely disagree with the

Fifth Circuit; they examined additional factors that the Fifth Circuit did not, and they explicitly refuted key aspects of the Fifth Circuit's analysis.[3] It thus is entirely possible that the Fifth Circuit will eventually reconsider its position.[4]

2. Contrary to petitioner's contention (Pet. 19-20), additional percolation is warranted. As described above, the Fifth Circuit may resolve the split by reconsidering its flawed opinion. But even if the Fifth Circuit refuses to act, the political branches may dispose of the confusion on their own.

First, Congress is actively considering a multitude of amendments to Dodd-Frank. See, *e.g.*, Associated Press, *Republican-led House Panel Votes To Gut Dodd-Frank Financial Law*, L.A. Times, May 4, 2017 <tinyurl.com/amendingdoddfrank>. If it feels that the SEC misunderstood the statutory scheme, it can always say so directly by amending Section 78u-6(h)(1)(A) and addressing the precise issue dividing the lower courts. But cf., *e.g.*,

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[3] More specifically, these courts have attacked *Asadi*'s textual analysis (*e.g.*, *Berman*, 801 F.3d at 153-154; Pet. App. 7a), its view of the statutory purpose and operation (*e.g.*, Pet. App. 9a-10a), and its understanding of the legislative history (*e.g.*, *Berman*, 801 F.3d at 154-155). See also, *e.g.*, *Peters* v. *LifeLock Inc.*, No. 14-576, 2014 WL 12544495, at *4, *5 (D. Ariz. Sept. 19, 2014) ("may courts have criticized [*Asadi*] as adopting an overly restrictive view of the statutory language"; "[t]his construction is not convincing for multiple reasons not addressed by the Fifth Circuit"); *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 732-733 (D. Neb. 2014) (rejecting *Asadi* as "unwieldy").

[4] Petitioner is correct that dozens of district courts have adopted conflicting decisions. Pet. 12, 15-16. But those conflicts do not independently warrant review (see Sup. Ct. R. 10), as the supervising circuits are capable of resolving any confusion at the district level. Those conflicts will also predictably dissipate once additional circuits adopt the majority position.

Ed Beeson, *Three Little Words: Confusion Over Dodd-Frank Is Leaving Whistleblowers Exposed*, Law360, Sept. 19, 2016 <tinyurl.com/doddfrankconfusion> ("We need to make sure people report wrongdoing, however they choose to report it. * * * The whistleblowers who are in the thick of things know the best place to go with their information, whether it's internal or external, and they need to feel safe doing it. It would hurt the cause of fraud reporting to discourage an entire category of whistleblowers. * * * *In this case, the SEC has it right in its interpretation that the law protects internal and external whistleblower reporting.*") (statement of Sen. Grassley) (emphasis added).

Second, the SEC always has the option of revisiting the issue. If Dodd-Frank's protection for internal reporting truly creates as many problems as petitioner suggests, then the SEC could take appropriate measures to promulgate a modified regulation. While respondent respectfully suggests such a course is exceedingly unlikely—for any number of obvious reasons—a short delay in taking up the issue would give the agency time to evaluate its options.[5]

3. Petitioner is correct that this is a "recurring" question that "arises often" in the lower courts. Pet. 9, 17. But in these circumstances, recurrence is a reason for *denying* review, not granting it: There will be ready opportunities

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[5] Of course, the SEC's ability to curtail protection for internal reporting under Section 78u-6(h) would depend on convincing courts that the statute does not unambiguously *require* such protection. Although certain courts have upheld the regulation on the ground that the statute is ambiguous (*e.g.*, *Berman*, *supra*), others have suggested that the SEC's reading is the *only* permissible reading (cf. Pet. App. 10a). For those courts, the SEC would lack the ability to narrow Congress's protections for this important category of internal whistleblowing.

to decide the question in the event the conflict persists after additional circuits confront the question. Indeed, the question is currently pending in at least three additional circuits. See, *e.g.*, *Deykes* v. *Cooper-Standard Auto., Inc.*, No. 16-2740 (6th Cir.) (filed Dec. 15, 2016); *Verfuerth* v. *Orion Energy Sys., Inc.*, No. 16-3502 (7th Cir.) (filed Sept. 22, 2016); *Duke* v. *Prestige Cruises Int'l, Inc.*, No. 16-15426 (11th Cir.) (filed Aug. 10, 2016). A short delay will provide appropriate room for the Fifth Circuit to reconsider its position or other circuits to further develop the relevant arguments.

Nor is there any significant cost to a modest delay. Petitioner argues that the decision below imposes "pernicious" consequences on employers. But that proposition is highly doubtful. The question presented asks whether conduct actionable under Sarbanes-Oxley is *separately* actionable under Dodd-Frank. That means that petitioner's conduct (as alleged) is already unlawful under federal law. The only daylight between the circuits is whether such illegal retaliation violates *two* federal statutes instead of one.

This is thus unlike situations where companies are subjected to different *substantive* standards in different jurisdictions. Every public company here faces the same nationwide rule prohibiting retaliatory acts under Sarbanes-Oxley; every employer (including petitioner) should conform their conduct to that governing federal standard irrespective of the outcome of this case. The fact that some wrongfully terminated parties may ultimately seek relief under Section 78u-6(h) (instead of Section

1514A) is not the kind of grave concern that warrants immediate review.[6]

B. This Case Is A Suboptimal Vehicle For Deciding The Question Presented

According to petitioner, this case is an "optimal" vehicle for resolving this issue. Pet. 10. But this case suffers from at least two vehicle concerns, each of which is an appropriate basis for denying review.

1. The case arises in an interlocutory posture, a sufficient reason alone for denying the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (the lack of final judgment "alone furnishe[s] sufficient ground" for denying certiorari); see also, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree," *Hamilton-Brown Shoe*, 240 U.S. at 258, and there is nothing remotely "extraordinary" here. This case reaches the Court from a motion to dismiss. There are multiple other claims pending below (Pet. App.

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[6] According to petitioner, the decision below threatens to "upset th[e] balance" between Sarbanes-Oxley and Dodd-Frank, "essentially rendering obsolete the Sarbanes-Oxley Act's anti-retaliation scheme." Pet. 17-18 (citing Dodd-Frank's "distinct advantages"). This is incorrect. Each scheme presents its own set of benefits and costs; parties have different reasons for preferring each scheme, which is presumably why Congress gave injured claimants a choice between available remedies. Cf. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Indeed, even under petitioner's theory, there is a hypothetical subset of plaintiffs—those who use both internal and external reporting—that indisputably could invoke either set of remedies. No one seriously believes that this choice threatens the "balance" between these integrated regulatory schemes. See also Part C.3.a, *infra*.

12a-13a), and further proceedings could develop a fuller record better suited for the Court's review—or even obviate the need for any review entirely.

To be sure, this case was certified for immediate appeal under 28 U.S.C. 1292(b), and it does present a pure and important question of law. "But nothing in the Interlocutory Appeals Act itself or in its legislative history suggests that the Court should depart from its usual rules respecting review of interlocutory judgments." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.19, at 286 (10th ed. 2013). If petitioner later wishes to present the same question, it can do so again, if necessary, after final judgment. But that slight inconvenience for this single petitioner on this single claim does not warrant abandoning the Court's traditional and sound practice of refusing to hear interlocutory appeals in all but the most unusual and compelling circumstances. See, *e.g.*, *id.* § 4.18, at 282-285.

And that practice holds especially true here, where additional proceedings will present a fully developed record and allow additional time for the issue to percolate among the lower courts. If respondent in fact prevails on the merits, and if at that point other courts still reach opposite conclusions after squarely addressing the question presented in a meaningful way, review in this Court might indeed be appropriate. It is not, however, appropriate for this case at this time.

2. This case also arises with a potential, but unaddressed, jurisdictional problem. According to petitioner's briefing below (C.A. Br. 35-38; C.A. Reply Br. 33-37), if Dodd-Frank protects internal disclosures under Sarbanes-Oxley, it must also require *exhaustion* under Sarbanes-Oxley. See 18 U.S.C. 1514A(b)(1)(A)-(B) (authorizing enforcement actions by "filing a complaint with the Secretary of Labor" or "if the Secretary has not issued

a final decision within 180 days of the filing of the complaint * * * , bringing an action at law or equity * * * in the appropriate district court"). Petitioner argued that Section 1514A's procedures are automatically grafted onto claims under Section 78u-6(h), and further argued that those procedures are jurisdictional in nature. See, *e.g.*, C.A. Br. 35-36 & n.6 ("determining if administrative exhaustion is required under Dodd-Frank as it is under Sarbanes-Oxley * * * is a jurisdictional consideration"). Thus, according to petitioner, respondent's failure to exhaust his Dodd-Frank claim under Sarbanes-Oxley's administrative scheme eliminated subject-matter jurisdiction over that claim. *Ibid.*[7]

To be perfectly clear, while petitioner did raise this issue below, the argument is wholly insubstantial. First and foremost, it plainly misunderstands the statutory scheme. Administrative exhaustion under Sarbanes-Oxley is mandated *for those seeking relief under Sarbanes-Oxley*. It is a predicate for invoking the particular right of action granted by that Act. It has nothing to do, however, with the underlying *conduct* required or protected under that Act. Compare 15 U.S.C. 78u-6(h)(1)(A)(iii) (protecting "disclosures that are required or protected" under Sarbanes-Oxley—yet *not* requiring proceedings under Sarbanes-Oxley's enforcement scheme).[8]

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[7] It is undisputed that respondent did not exhaust his remedies under Section 1514A—*because he was not proceeding under that section*. His claims may have invoked Sarbanes-Oxley as a predicate for relief, but his private right of action was authorized directly under Section 78u-6(h)(1)(A)(iii). See Pet. App. 13a.

[8] This is immediately clear from Section 1514A's text and structure: It first outlines "[w]histleblower protection" under subsection (a)—describing conduct that is protected under the Act—and then *separately* authorizes "[e]nforcement action[s]" under subsection (b) if

When Section 78u-6(h)(1)(A)(iii) specifically covered internal disclosures "protected or required" by Sarbanes-Oxley, it said absolutely nothing about incorporating that Act's separate administrative or remedial scheme. Petitioner may prefer exhaustion under both Acts, but Congress limited exhaustion to proceedings under Section 1514A. It is not required under Section 78u-6(h), and hence it poses no obstacle to respondent's Dodd-Frank claims.

Second, even if Section 1514A's administrative scheme somehow applied here, it is plainly wrong that any failure to exhaust has jurisdictional implications. Not every statutory element or requirement is automatically jurisdictional (*Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006)), and nothing in Section 1514A suggests failing to exhaust implicates a court's subject-matter jurisdiction. Section 78u-6(h) itself assuredly says nothing to that effect, and neither provision uses any of the classic formulations typical of jurisdictional provisions. Just as the courts of appeals have found related schemes to be non-jurisdictional, there is absolutely no basis for thinking that Section 1514A's particular exhaustion requirement (found in a different statute, no less) carries jurisdictional consequences under Section 78u-6(h). See, *e.g.*, *Fowlkes* v. *Ironworkers Local 40*, 790 F.3d 378, 384-385 (2d Cir. 2015) ("a plaintiff's failure to exhaust administrative remedies available for Title VII [retaliation] claims does not pose a

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those protections are violated. 18 U.S.C. 1514A(a), (b); see also 18 U.S.C. 1514A(c)(1) (providing the "[r]emedies" for "action[s] under subsection (b)(1)"). The former delineates the protected conduct and prohibitions, and the latter authorizes actions to enforce those prohibitions. See also 18 U.S.C. 1514A(b)(1) ("[a] person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c)"). Dodd-Frank is concerned only with the former, not the latter.

jurisdictional bar"); *Adamov* v. *U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855-856 (6th Cir. 2013) ("Because Congress has not explicitly restricted the court's jurisdiction in cases where a plaintiff has not exhausted administrative remedies, a district court may not dismiss the [retaliation] claim on jurisdictional grounds."); *Avocados Plus Inc.* v. *Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) ("[w]e presume exhaustion is non-jurisdictional unless 'Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision'").

But the wrongness of petitioner's lower-court position is not what matters here. The mere presence of this issue is adequate reason to pause before granting review. The district court declared the issue waived (Pet. App. 43a-44a), and the court of appeals failed to address it at all (Pet. App. 1a-11a). But if the issue were truly jurisdictional, it could not be waived—and this Court would be forced to resolve it at the outset, before reaching the merits of the question presented. See, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998). That poses a clear obstacle to review, and casts considerable doubt on this case as an appropriate vehicle for resolving the question presented.

C. Review Is Otherwise Unwarranted Because The Decision Below Is Correct

Review is also unwarranted because the decision below is correct. Petitioner's cramped interpretation is directly at odds with Section 78u-6's text, purpose, structure, and history, which is precisely why the SEC (as the agency tasked with its enforcement) has rejected it after formal notice-and-comment rulemaking. Even without delving into detail more appropriate for plenary review, the majority position is plainly correct.

1. Petitioner frames the issue as a basic question of statutory construction (Pet. 3), but that is wrong. This is not simply a matter of construing a statute, but reviewing an *agency's* construction of that statute. Congress expressly charged the SEC with enforcing these provisions, 15 U.S.C. 78u-6(j), and the SEC invoked that authority in construing the statute to protect internal whistleblowing, 17 C.F.R. 240.21F-2(b)(1)(ii). In order to set aside the agency's interpretation, petitioner must not merely establish that its preferred construction is reasonable, but that it is *mandatory*. Unless Congress spoke to the "precise question" at issue, the agency's position is entitled to deference. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).[9]

Petitioner, however, barely acknowledges the SEC's vital role in this process. It did not, for example, recognize or reproduce the language of Section 78u-6(j): "The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." And petitioner did not grapple with how this textual delegation confirms Congress's view of the SEC's importance in construing these interlocking schemes.

In order for petitioner to prevail, it must demonstrate that Congress unambiguously foreclosed the SEC's inter-

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[9] Nor is this task a simple matter of reading the definitional section on its own: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132.

pretation of the statute it was explicitly charged with administering. As the majority of courts have determined, petitioner cannot overcome that heavy burden.

2. In its question presented, petitioner asks whether Section 78u-6(h)'s anti-retaliation provision extends to individuals who "fall outside the Act's definition of a 'whistleblower.'" Pet. I (referencing 15 U.S.C. 78u-6(a)(6)). But the real question is not whether respondent fits within that statutory definition, but whether Congress intended that general definition *to apply specifically to subsection (h)*. See, *e.g.*, *Berman*, 801 F.3d at 147 ("the issue presented is whether the 'whistleblower' definition in [Section 78u-6(a)(6)] applies to subdivision (iii) of [Section 78u-6(h)(1)(A)]," which "does not within its own terms limit its protection to those who report wrongdoing to the SEC"). And there are compelling indications that Congress did not intend the "whistleblower" definition to restrict subdivision (iii)'s broad sweep.

First, contrary to *Asadi*'s wooden reasoning (720 F.3d at 623, 627), statutory definitions are not always controlling. As *Berman* explained, while "the terms of a definitional subsection are usually to be taken literally," "'[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.'" 801 F.3d at 154 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 227-228 (2012)). Thus, "[t]he use of a term in one part of a statute 'may mean [a] different thing[]" in a different part, depending on context." Pet. App. 7a (quoting *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)); see also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

And the context here is plain. Subdivision (iii) textually cross-references provisions in Sarbanes-Oxley that do *not* require reporting to the SEC *and* define the protected

class *as "[w]histleblower[s]."* 18 U.S.C. 1514A(a)(1)(C). This is further contrasted by the textual references to the SEC-disclosure requirements in subdivisions (i) and (ii), which would arguably "be superfluous" under petitioner's construction. *Berman*, 801 F.3d at 154. In short, subsection (a)'s "definition speaks of reporting to the Commission, but subdivision (iii) incorporates Sarbanes-Oxley provisions, which contemplate internal reporting, without reporting to the Commission." *Ibid.* At a minimum, this leaves "significant tension" between these two critical provisions. See, *e.g.*, *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) ("the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies'").

Second, petitioner's interpretation "would, in effect, all but read subdivision (iii) out of the statute." Pet. App. 8a. This Court has repeatedly rejected statutory readings that would render terms "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Yet petitioner's reading would "narrow[]" subdivision (iii) "to the point of absurdity." Pet. App. 8a. It would entirely cut out protections for lawyers and auditors—two key groups with essential roles in catching and stopping unlawful conduct. *Berman*, 801 F.3d at 151 ("[T]here are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer. Chief among these are auditors and attorneys."). If an employee must report internally before having the option of reporting to the SEC, the employee is left without any meaningful protection at all—"that required preliminary step would result in early

retaliation before the information could reach the regulators." Pet. App. 7a; see also *id.* at 8a ("Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. The anti-retaliation provision would do nothing to protect these employees from immediate retaliation in response to their initial internal report.") (citation omitted).

Given the critical roles occupied by lawyers and auditors under both Dodd-Frank and Sarbanes-Oxley, it is implausible that Congress intended to strip away their protections in such an indirect fashion. See, *e.g.*, *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162, 1168 (2014). And even aside from those professionals, "although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number." *Berman*, 801 F.3d at 151. Indeed, while *Asadi* imagined this hypothetical group to give subdivision (iii) some effect, 720 F.3d at 627-628, it failed to identify a single, real-world example fitting this unusual pattern.[10] "Thus, apart from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope." *Berman*, 801 F.3d at 152 (footnote omitted); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001) (asking whether a construction "would in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances"); *Robinson*, 519 U.S. at 346.

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[10] See Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) ("The Fifth Circuit is also unable to point to any concrete examples of such a situation ever occurring.").

Third, petitioner's reading, unlike respondent's, makes little sense in light of the overall statutory scheme. Sarbanes-Oxley's chief focus is on internal compliance and internal reporting. *E.g.*, Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829, 1832 (2011). Yet a rule hinging protection exclusively on *external* reporting directly frustrates that statutory objective. It discourages the use of internal policing, and defeats the point of setting up "internal processes for investigating and responding to potential violations of the Federal securities laws." Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010). "Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829, 47830 (Aug. 10, 2015). Petitioner's competing interpretation, by contrast, "would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting." *Ibid.*[11]

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[11] The U.S. Chamber of Commerce participated in the rulemaking process, submitting a comment (together with other groups) underscoring "the important role that internal corporate programs have in promoting compliance with securities and other laws," and arguing that "preserving that role should be a policy touchstone in formulating rules to implement the Dodd-Frank whistleblower provisions." Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* 3 (Dec. 17, 2010) <tinyurl.com/uschambercomments>. Although the

The SEC properly recognized that Congress did not intend to create "a 'two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances.'" Pet. App. 42a. By directly frustrating the key aims of Sarbanes-Oxley, petitioner's theory would create an utterly incoherent statutory scheme. See, *e.g.*, *Utility Air*, 134 S. Ct. at 2442 (asking whether a construction is "incompatible * * * with th[e] programs' regulatory structure"); *Brown & Williamson*, 529 U.S. at 133 ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted).

Finally, the legislative history supports the decision below. While the congressional record is limited, this provision was added at the last minute by the Conference Committee in reconciling the House and Senate versions of Dodd-Frank. *Berman*, 801 F.3d at 152-153 & n.8. It takes little imagination to understand what happened: "When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." *Id.* at 154. It is "doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in [subsection (a)]." *Id.* at 155;

Chamber advocated for conditioning *award* eligibility based on internal reporting, the same principles apply equally to whistleblower protections. It is unclear how the Chamber squares its current position as amicus with its comments to the SEC.

see also *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) ("we have explained that the statute should be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes"'").

3. a. In response, both petitioner and the Fifth Circuit maintain that the decision below would render Sarbanes-Oxley's enforcement scheme "moot" because "no one would use it." Pet. App. 9a (describing *Asadi*, 720 F.3d at 628-629); Pet. 18 (arguing that the Act's scheme will become "obsolete" because Dodd-Frank "affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act does not"). But this theory has been squarely refuted by the SEC, as "Sarbanes-Oxley may be more attractive to the whistleblowing employee in at least two important ways." Pet. App. 9a (describing the SEC's arguments).

First, while petitioner presumes that most parties wish to avoid administrative review, that is certainly not true for all parties. Under Sarbanes-Oxley, the agency "tak[es] responsibility for asserting the claim on the whistleblower's behalf," thus reducing "cost[s]" and "stress[]" for parties otherwise pursuing relief on their own in federal court. *Ibid.* Just as employers often prefer administrative review, employees may likewise prefer it for similar reasons.

Second, while Dodd-Frank does authorize double backpay, see 15 U.S.C. 78u-6(h)(1)(C), Sarbanes-Oxley authorizes "all relief necessary to make the employee whole," including "compensation for any special damages," 18 U.S.C. 1514A(c)(1), (2)(C). See Pet. App. 9a-10a (citing *Jones* v. *SouthPeak Interactive Corp.*, 777 F3d 658, 672 (4th Cir. 2015)). Although some employees will favor double backpay, "[a]n employee who has suffered more substantial emotional injury than financial harm would

likely be better off with Sarbanes-Oxley's allowance for special damages." Pet. App. 9a-10a.

Petitioner has no response to these straightforward observations.

b. According to *Asadi*, removing the SEC reporting requirement from subdivision (iii) would "violate the surplusage canon" by "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." 720 F.3d at 628. This is wrong. That "definition" would still retain force in the broadest sweep of the statute, including the key provisions limiting the universe of individuals eligible for incentive awards. See, *e.g.*, 15 U.S.C. 78u-6(b)(1). But as *Berman* explained, the question is not what the definitional section means, but rather whether it applies at all to subdivision (iii). 801 F.3d at 147; see also *Robinson*, 519 U.S. at 343 ("those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts"). In light of the statute's plain text, structure, and purpose, the answer is plainly no.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECORD
AND
BRIEFS

No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Remarkably, in the very first paragraph of his brief in opposition, respondent all but concedes that certiorari should be granted: he acknowledges that the courts of appeals are "divided" on the question presented, and he further acknowledges that the question is "important and recurring." Br. in Opp. 1. Respondent proceeds to devote much of his brief to arguing that the decision below is correct. See *id.* at 12-20. Of course, respondent may reprise those arguments at the merits stage if the Court grants certiorari. For present purposes, however, it suffices to observe that the five of the nine appellate judges who have

considered the question presented disagree with respondent's interpretation of the Dodd-Frank Act's anti-retaliation provision. The sharply contrasting views of those judges underscore the need for this Court's review.

To the extent that respondent halfheartedly argues that further review is nevertheless unwarranted, his arguments plainly lack merit. Respondent urges the Court to await further percolation on the question presented. But respondent fails to identify any particular benefit from doing so: the relevant arguments are fully developed in the existing lower-court opinions, and respondent offers no plausible reason to believe that the conflict will eventually disappear. To the contrary, denying certiorari in this case would merely prolong the confusion in the lower courts, while continuing to expose employers to the significant burdens associated with defending retaliation claims under the Dodd-Frank Act.

Respondent's vehicle arguments fare no better. The interlocutory posture of this case presents no obstacle to the Court's review; indeed, with respondent's consent, further proceedings in the district court have been stayed pending the disposition of this petition. And while respondent points to an exhaustion argument that petitioner made below, that too presents no bar, because the district court deemed the argument forfeited and petitioner is no longer advancing it. As the broad amicus support and commentary confirm, the case for certiorari here is overwhelming. The petition should be granted.

1. Respondent primarily argues (Br. in Opp. 3-8) that, notwithstanding the conceded circuit conflict on the question presented, further percolation is warranted. Respondent does not dispute, however, that the arguments on both sides of the question presented are well developed in five opinions from three court of appeals panels and in

more than two dozen opinions from district courts nationwide. Further percolation thus would not aid the Court's consideration and resolution of the question presented. And respondent's speculation that the conflict will disappear, or that Congress will amend the Dodd-Frank Act's anti-retaliation provision, or that the Securities and Exchange Commission will amend its rule, is just that: speculation. There is no valid justification for postponing further review on this concededly important and recurring question.

a. While respondent concedes that "the existing conflict is admittedly clear," he contends that it is "entirely possible" that the conflict will disappear because "the Fifth Circuit will eventually reconsider its position" and "additional circuits [will] adopt the majority position." Br. in Opp. 4-5 & n.4.

That is highly unlikely. As a preliminary matter, respondent skates past the substantial and continuing divergence in the lower courts, which belies any claim of an emerging consensus. Respondent completely ignores the vigorous dissents—by Judge Jacobs on the Second Circuit and Judge Owens on the Ninth Circuit—from the two court of appeals decisions to have adopted his interpretation. Taking the dissenters' views into account, five of the nine appellate judges who have considered the question presented have adopted petitioner's interpretation rather than respondent's. And notwithstanding the divided decisions of the Second and Ninth Circuits, district courts in other circuits have continued to adopt petitioner's interpretation as well: since the beginning of 2015, five of the seven district court decisions from other circuits have adopted petitioner's interpretation, and only two have adopted respondent's. See Pet. 12, 15. In light of that continuing disagreement, it is highly doubtful that other

circuits will simply fall into line with the Second and Ninth Circuits, rather than following the Fifth.

Nor is there any reason to believe that the Fifth Circuit will reverse course in light of the conflicting decisions of the Second and Ninth Circuits. For starters, the Fifth Circuit has already rejected the very arguments that animated the majority opinions in those cases. See *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626-630 (5th Cir. 2013). Conversely, the dissenting judges in those cases expressly adopted the Fifth Circuit's reasoning. See Pet. App. 11a (Owens, J., dissenting); *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 155-157 (2d Cir. 2015) (Jacobs, J., dissenting).

To be sure, as respondent correctly notes (Br. in Opp. 4), the SEC did not "direct[ly] participat[e]" as an amicus curiae before the Fifth Circuit. But that is of no moment, because the Fifth Circuit had the benefit of the SEC's views in the form of the rule interpreting Section 78u-6—which was accompanied by a detailed explanation of the SEC's rationale for adopting it. See 76 Fed. Reg. 34,302-34,304 (2011). The Fifth Circuit reviewed the SEC's interpretation and ultimately rejected it on the ground that it was inconsistent with the unambiguous text of the statute (and thus not entitled to deference). See *Asadi*, 720 F.3d at 629-630. For that reason, it stretches credulity to suggest that the Fifth Circuit would have reached a different result if only it had received an amicus brief from the SEC defending its rule.

Beyond his argument that the Fifth Circuit might one day reverse itself, respondent wisely does not argue that a two-to-one circuit conflict is too shallow to warrant further review. Especially in recent years, the Court has routinely granted review to resolve two-to-one or even one-to-one circuit conflicts. See, *e.g.*, *Expressions Hair*

Design v. *Schneiderman*, 137 S. Ct. 1144 (2017) (2-1 conflict); *Taylor* v. *United States*, 136 S. Ct. 2074 (2016) (2-1); *Ocasio* v. *United States*, 136 S. Ct. 1423 (2016) (1-1); *Nichols* v. *United States*, 136 S. Ct. 1113 (2016) (1-1); *Luis* v. *United States*, 136 S. Ct. 1083 (2016) (1-1). Given the continuing divergence in the lower courts, postponing further review would serve no purpose other than allowing the conflict to fester and deepen.

b. Respondent next suggests (Br. in Opp. 5-6) that Congress might amend the Dodd-Frank Act, or the SEC might amend its rule, in a way that resolves the question presented. That is pure speculation. While Congress is currently considering amendments to the Dodd-Frank Act, the amendments proposed to date would have no bearing on the question presented. See Financial Choice Act, H.R. 10, 115th Cong. (2017). The only proposed amendment related to the anti-retaliation provision would deny awards to whistleblowers who are complicit in the wrongdoing they report. See *id.* § 828. Nor is there any indication that the SEC intends to amend its rule; even respondent recognizes that such an amendment is "exceedingly unlikely * * * for any number of obvious reasons." Br. in Opp. 6.

c. Respondent is left to argue (Br. in Opp. 6-8) that awaiting further percolation would pose no significant cost to employers such as petitioner. That is apparently because, in respondent's view, "petitioner's alleged conduct violates federal law; the only question is whether relief is available under two statutes, rather than one." *Id.* at 4.

Respondent's concessions elsewhere in his brief expose the fallacy of that argument. In the very first paragraph, respondent acknowledges that the question presented is "admittedly important." Br. in Opp. 1; see *id.* at 9 (stating that the case presents a "pure and important

question of law"). The question presented by this case is not whether employees such as respondent have two retaliation claims (under both the Sarbanes-Oxley Act and the Dodd-Frank Act) or only one (under the Sarbanes-Oxley Act). Indeed, respondent *cannot* bring a retaliation claim under the Sarbanes-Oxley Act, both because any such claim would be time-barred and because respondent failed to invoke that Act's administrative-review procedure. See Pet. 18-19.

If allowed to stand, the decision below will create incentives for other employees who do not report wrongdoing to the SEC to do precisely what respondent did here: namely, to circumvent the administrative-review procedure, and avoid the limitations period, established by the Sarbanes-Oxley Act. As petitioner's amici have explained, allowing employees to engage in such circumvention imposes heavy burdens on employers and threatens to render the Sarbanes-Oxley regime effectively obsolete. See Chamber of Commerce Br. 10-12 (citing the proliferation of whistleblower lawsuits under the Dodd-Frank Act and the loss of the Sarbanes-Oxley regime's benefits for employers); DRI Br. 9-13 (explaining the substantial risk of liability under the Dodd-Frank Act stemming from the broad range of reporting protected by the Sarbanes-Oxley Act); Lime Energy Br. 3-4 (noting the "unnecessary cost and administrative complexity" caused by the circuit conflict). By any measure, those are serious costs to further percolation, and they weigh heavily in favor of immediate review.

2. Respondent advances two passing vehicle arguments (Br. in Opp. 8-12), but both are patently flawed. As respondent concedes, the petition "present[s] a pure and important question of law," *id.* at 9, and there is no obstacle to reviewing and resolving that question here.

a. Respondent first contends (Br. in Opp. 8-9) that this Court should deny review because the case arises in an interlocutory posture. But the Court routinely grants certiorari where, as here, a petition presents a clean and dispositive legal question before final judgment. See, *e.g.*, *Midland Funding, LLC* v. *Johnson*, 137 S. Ct. 1407 (2017); *Bank of America Corp.* v. *City of Miami*, 137 S. Ct. 1296 (2017); *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017).

As in those cases, the interlocutory posture of this case presents no barrier to review. Respondent has conceded that the question presented is a "pure" one of law, and respondent does not dispute that a ruling in petitioner's favor on that question would dispose of his claim under the Dodd-Frank Act. With respondent's consent, the district court stayed further proceedings pending the disposition of this petition. See D. Ct. Dkt. 210 (Apr. 11, 2017). And while respondent suggests that "further proceedings could develop a fuller record," Br. in Opp. 9, he does not specify how additional factual development would be relevant to resolution of the "pure" question of law that this case concededly presents.

b. Finally, respondent contends (Br. in Opp. 9-12) that this Court would have to consider and resolve the additional question whether respondent's claim under the Dodd-Frank Act fails because he was required to (and did not) exhaust his remedies under the Sarbanes-Oxley Act. But the district court deemed the exhaustion argument forfeited, see Pet. App. 43a-44a; the court of appeals did not address it, see *id.* at 1a-11a; and petitioner did not raise it in the petition. Nor does petitioner intend to advance that argument in further proceedings before this Court; upon further consideration, petitioner agrees that respondent's failure to exhaust his remedies under the Sarbanes-Oxley Act does not present a jurisdictional bar

to his claim under the Dodd-Frank Act. As this case comes to the Court, therefore, both parties and both lower courts agree that the case raises no jurisdictional issue. The case is therefore a clean vehicle for addressing the question presented—a concededly important and recurring question on which the courts of appeals are indisputably divided.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

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DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act" or "Act") in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide.

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1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no party or party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *Amicus Curiae*, its counsel, and its members made a monetary contribution intended to fund this brief's preparation or submission.

The interpretation of the Dodd-Frank Act espoused by the Ninth Circuit in this case would greatly expand the number of employees authorized to pursue the enhanced remedies of the Act, and the period of time in which they may sue for alleged retaliation, without yielding the law enforcement benefits Congress intended when it enacted a "bounty" and heightened protections for persons who complain to the Securities and Exchange Commission. The carefully crafted procedures established in 2002 in the Sarbanes-Oxley Act would become largely moot and obsolete under the Ninth Circuit's interpretation, depriving Chamber members of the limitations and protections established by that earlier law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Dodd-Frank Act defines "whistleblower" to mean "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*." 15 U.S.C. § 78u-6(a)(6) (emphasis added). This case presents the question whether an individual who does not satisfy the express statutory definition of "whistleblower" may nevertheless seek relief under the Act's anti-retaliation protections for whistleblowers.

This issue is important, frequently recurring, and the subject of a split among the federal courts of appeals. The Fifth Circuit has correctly held that the Dodd-Frank Act's anti-retaliation provision protects only "whistleblowers"—*i.e.*, individuals who provide information relating to a violation of the securities laws to the Securities and Exchange Commission ("SEC" or the "Commission").

See Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir. 2013). By contrast, divided panels of the Ninth and Second Circuits have held that the Dodd-Frank Act's anti-retaliation provision protects all those who report to the SEC and those who report internally. *See Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045 (9th Cir. 2016); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

The interpretation of the Dodd-Frank Act espoused by the Ninth and Second Circuits has profound implications for employers across the country and in every industry. If allowed to stand, it would severely disrupt the carefully constructed anti-retaliation programs established by Congress, and open the door to countless lawsuits that Congress never intended Dodd-Frank to cover.

For these and additional reasons discussed below, this Court should grant the petition for certiorari and reverse the decision below.

ARGUMENT

I. The Ninth Circuit's Decision Is Incorrect and Deepens A Conflict Among The Circuits

The Dodd-Frank Act sought to further enforcement of the securities laws by establishing a "bounty" for "whistleblowers" who provide information to the SEC that leads to successful enforcement actions. 15 U.S.C. § 78u-6; *see* S. Rep. No. 111-176, at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.").

A "whistleblower" is defined in the Act as:

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.

15 U.S.C. § 78u-6(a)(6) (emphasis added).

Whistleblowers who assist in successful enforcement actions are entitled to recover 10-30% of "what has been collected of the monetary sanctions imposed in th[at] action." § 78u-6(b)(1).[2]

In addition to granting this bounty to "whistleblowers," the Act also protects them from retaliation, providing:

> No employer may discharge, demote, suspend, threaten, harass . . . or in any other manner discriminate against[] a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower*—
>
> (i) in providing information to the Commission in accordance with this section;

2. *See* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make awards that are sufficiently robust to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.").

> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

§ 78u-6(h)(1)(A) (emphasis added). Whistleblowers who experience retaliation in violation of this provision may sue directly in federal district court as many as 10 years after the retaliatory action, and monetary damages are doubled. § 78u-6(h)(1)(B)(i), (h)(1)(B)(iii), (h)(1)(C)(ii).

The language of Section 78u-6 unambiguously provides a cause of action only to individuals who have provided information to the SEC. The statute clearly defines "whistleblowers" as those who "provide[] information relating to a violation of the securities laws to the Commission, in a manner established" by the Commission's whistleblower "bounty" rules. § 78u-6(a)(6).

And the Fifth Circuit correctly applied the statute according to its plain terms in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

In *Asadi*, an employee made an internal report regarding a potential violation of securities laws, but did not report the potential violation to the SEC. *Id.* at 621. The employee was later discharged and filed a complaint

in district court, alleging a violation of Dodd-Frank's anti-retaliation provision. *Id.* The district court dismissed the complaint, but did not reach the issue regarding the scope of Dodd-Frank's anti-retaliation provision. *Id.*

The Fifth Circuit affirmed, holding that Dodd-Frank's anti-retaliation provision protects only individuals who report information to the SEC. The court explained that the "whistleblower" definition in Section 78u-6(a)(6) establishes "who is protected," while the anti-retaliation provision in Section 78u-6(h)(1)(A) specifies "what actions" taken by that person are protected. *Id.* at 624-26. The court stressed that any other reading of Section 78u-6 "would read the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." *Id.* at 628. The court declined to defer to the SEC's regulation because the statute is "unambiguous[]," and because the regulation "redefines 'whistleblower' more broadly" than the statute. *Id.* at 629-30.[3]

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3. At least twelve district courts have followed the Fifth Circuit's interpretation. *See Olekanma v. Wolfe*, No. 15-cv-0984, 2017 WL 784121, at *3 (D. Md. Mar. 1, 2017); *Deykes v. Cooper-Standard Auto., Inc.*, No. 16-cv-11828, 2016 WL 6873395, at *2-4 (E.D. Mich. Nov. 22, 2016); *Lamb v. Rockwell Automation, Inc.*, No. 15-cv-1415, 2016 WL 4273210, at *3-4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 663-65 (E.D. Va. 2015); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 650 (E.D. Tenn. 2015), *aff'd on other grounds*, No. 15-cv-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *cert. denied*, No. 16-cv-946, 2017 WL 434012 (U.S. Mar. 20, 2017); *Davies v. Broadcom Corp.*, 130 F. Supp. 3d 1343, 1348-49 (C.D. Cal. 2015); *Duke v. Prestige Cruises Int'l, Inc.*, No. 14-cv-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015), *appeal filed*, No. 16-cv-15426, 2015 WL 4886088 (11th Cir. Aug 11, 2016); *Verfuerth v.*

The Second and Ninth Circuits have expressly rejected *Asadi*, deviating from the plain terms of the statute. In *Berman v. Neo@Ogilvy LLC*, a divided panel of the Second Circuit held that Section 78u-6 is ambiguous and deferred to the SEC's regulation extending protection to anyone who makes a report, whether the report is made internally or to the SEC. 801 F.3d at 146 (concluding that "the pertinent provisions of Dodd-Frank create a sufficient ambiguity to warrant our deference to the SEC's interpretive rule"). In the decision below, a divided panel of the Ninth Circuit went even further and held that Dodd-Frank unambiguously compels the interpretation adopted by the SEC. *Somers*, 850 F.3d at 1047 (concluding that "the SEC regulation correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC").[4]

Orion Energy Sys., Inc., 65 F. Supp. 3d 640, 643-46 (E.D. Wis. 2014); *Sarkisov v. Stonemor Partners L.P.*, No. 13-cv-04834, 2014 WL 12644016, at *3-4 (N.D. Cal. June 25, 2014); *Englehart v. Career Educ. Corp.*, No. 14-cv-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755-57 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013), *aff'd on other grounds*, 571 F. App'x 698, (10th Cir. 2014).

4. At least eighteen district courts have followed the Second and Ninth Circuits. *See Kuhns v. Ledger*, 202 F. Supp. 3d 433, 438 n.1 (S.D.N.Y. 2016); *Wiggins v. ING U.S., Inc.*, No. 14-cv-01089, 2015 WL 8779559, at *1 (D. Conn. Dec. 15, 2015); *Lutzeier v. Citigroup Inc.*, No. 14-cv-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015); *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1024-27 (N.D. Cal. 2015), *motion to certify appeal denied*, No. 15-cv-02356, 2015 WL 8758292 (N.D. Cal. Dec. 15, 2015); *Dressler v. Lime Energy*, No. 14-cv-07060, 2015 WL 4773326, at *6-16 (D.N.J. Aug. 13, 2015); *Connolly v. Remkes*, No. 14-cv-01344, 2014 WL

The SEC and these Circuits misapprehend the structure of the statute. In finding that the protections of clause (iii) of the anti-retaliation provision extend coverage to a wider class of persons than the Act's definition of "whistleblower," they flip the statute's language: their approach makes *what the retaliation was for* determinative of *who* is protected, rather than first determining *who* is protected under the statutory definition of "whistleblower." The "whistleblower" definition governs clause (iii), not *vice versa*.

This circuit split should be resolved as speedily as possible. The conflict between the Fifth Circuit on the one hand, and the Second and Ninth Circuits on the other, creates an uneven playing field for employers, subjecting them to vastly different risks based on their geographic

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5473144, at *4-6 (N.D. Cal. Oct. 28, 2014); *Peters v. LifeLock Inc.*, No. 14-cv-00576, 2014 WL 12544495, at *3-7 (D. Ariz. Sept. 19, 2014); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 727-33 (D. Neb. 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 531-34 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-cv-4149, 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y 2014); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 146-48 (S.D.N.Y. 2013); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44-46 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, No. 12-cv-5914, 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013), *aff'd in part on other grounds and dismissed in part*, 566 Fed. App'x. 719 (10th Cir. 2014); *Kramer v. Trans-Lux Corp.*, No. 11-cv-1424, 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 992-95 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, No. 10-cv-8202, 2011 WL 1672066, at *3-5 (S.D.N.Y. May 4, 2011).

location alone. *See Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1761 (2013) ("[I]t is important to have a uniform interpretation of federal law"); *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility . . . is to ensure the integrity and uniformity of federal law")). So long as the decision below is left uncorrected, employers in the Second and Ninth Circuits face the threat of liability for claims that Congress never intended.

II. The Ninth Circuit's Decision Presents An Issue of Exceptional Importance

The Ninth Circuit's counter-textual interpretation of the Dodd-Frank Act, if left to stand, will result in a number of harmful consequences. Among them, it will undermine the carefully constructed anti-retaliation provisions and procedures of the Sarbanes-Oxley Act, and impose unwarranted litigation costs on employers.

Less than 10 years before enacting the Dodd-Frank Act, Congress established a comprehensive regime to protect, among others, the "internal" whistleblowers that the Ninth Circuit sought to cover with its reading of Dodd-Frank. In the Sarbanes-Oxley Act, Congress authorized employees to file a complaint with the U.S. Department of Labor ("DOL") if they believe they have suffered retaliation for reporting, internally or externally, mail fraud, wire fraud, bank fraud, securities fraud, a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)-(b). The complaint is investigated by the Occupational Safety and Health Administration ("OSHA"), which renders findings and may order reinstatement of

an employee who has been improperly removed from his or her position. 18 U.S.C. §§ 1514A(b)(2)(A), (c)(2)(A); 29 C.F.R. Part 1980.104.

Either party may appeal OSHA's decision to an Administrative Law Judge ("ALJ"), who will permit discovery, conduct a bench trial, and issue a decision that may be appealed to the Administrative Review Board ("ARB"). 29 C.F.R. Parts 1980.106, 107, 109, 110. An ARB decision may be appealed to a federal court of appeals. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4). If a final DOL decision does not issue within 180 days of the employee's initial complaint, the complainant has the option of removing the case to a federal district court, where they may proceed *de novo*. 18 U.S.C § 1514A(b)(1)(B).

The Sarbanes-Oxley regime imposes important constraints. It provides for initial investigation by the DOL, which can lead to the prompt termination of baseless claims. Resolution within the Department is the preferred outcome, although complainants may "kick-out" the case to federal court in certain circumstances. The limitations period is short—the Sarbanes-Oxley Act prescribed a 90-day limitation period, which the Dodd-Frank Act extended to 180 days. 18 U.S.C. § 1514A(b)(2)(D); *see* H.R. 4173, 111th Cong. § 922(c)(1) (2010). Monetary relief is limited to compensatory damages, which may include back pay, litigation costs, and reasonable attorneys' fees, § 1514A(c)(2)(B)-(C).

If claimants may proceed under the Dodd-Frank Act's whistleblower provision even when they do not meet its definition of "whistleblower," there will be a proliferation

of whistleblower litigation under the Dodd-Frank Act, and the strictly circumscribed scheme of the Sarbanes-Oxley Act will be undermined. *See* Mark J. Oberti, *Employment Law: Recent Developments in Retaliation and Whistleblowing Law*, 69 The Advocate 31, 38 (2014) ("Depending on how this conflict is resolved in various jurisdictions, it could result in a dramatic reduction of OSHA charges of SOX retaliation and a significant increase in federal court SOX litigation brought through Dodd-Frank."). Extending the statute of limitations period to bring whistleblower-retaliation claims to 10 years from 180 days will significantly increase the number of stale cases brought, as claimants who are timed-barred under the Sarbanes-Oxley Act proceed under the Dodd-Frank Act instead. Furthermore, even claimants who are not otherwise time-barred will often prefer the double damages available under the Dodd-Frank Act; certainly, the plaintiffs' bar will feel the inexorable pull of a greater recovery.

That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims, while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under subsection 78u-6(h)(1). *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that

would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." (citation omitted)).

What is more, construing the Dodd-Frank Act to provide a cause of action for a violation of the Sarbanes-Oxley Act without a requirement to exhaust administrative remedies deprives employers of the considerable benefits that the Sarbanes-Oxley Act's administrative scheme provides, as proceeding through the DOL's OSHA fosters early settlements and dismissals. *See* Occupational Safety and Health Administration, CPL 02-03-007, *Whistleblower Investigations Manual* 6-12 to -13 (2016) ("Voluntary resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.").

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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RECORD AND BRIEFS

Supreme Court, U.S.
MAY 25 2017
OFFICE OF THE CLERK

No. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,
PETITIONER,
v.
PAUL SOMERS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that this Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—especially where national interests are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and all parties have filed blanket letters of consent with the Clerk's Office.

its members, their clients, and the judicial system. See, e.g., *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011); *University of Texas S.W. Med. Center* v. *Nassar*, 133 S. Ct. 2517 (2013). This is just such a case. Petitioner's issue implicates each of DRI's core concerns. The circuit split creates inconsistency in how federal law affords protection to whistleblowers, an area of significant importance to DRI's members and their clients. The interpretation of a statutorily defined term to mean something else implicates the fairness of the civil justice system by reducing the predictability of judicial results based on the text of statutory law. And the expansion of Dodd-Frank's anti-retaliation provision moots the streamlined administrative dispute-resolution process for claims of retaliation for reporting suspected securities-law violations in the Sarbanes-Oxley Act, undercutting the efficiencies Congress intended.

By construing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010's whistleblower-protection provision, 15 U.S.C. § 78u–6, to apply to employees who make reports other than to the Securities and Exchange Commission, the Ninth Circuit (like the Second Circuit before it) disdained Congress's limitations on the scope of the whistleblower-protection provision and disregarded this Court's precedent. DRI and its members are committed to achieving workplaces free from unlawful retaliation. But not all retaliation claims have merit. The issue raised in this case can result in an almost limitless anti-retaliation provision. Defending against even facially unmeritorious retaliation claims imposes a significant expense on employers, and the Ninth and Second Circuits'

misinterpretation of Dodd-Frank's whistleblower-protection provision exacerbates this burden.

SUMMARY OF ARGUMENT

The Ninth Circuit, like the Second Circuit before it, held that respondent's Dodd-Frank whistleblower retaliation claims could survive a motion to dismiss even though it is undisputed that respondent is not a "whistleblower" as Dodd-Frank defines that term. The broadly expansive reinterpretation of the whistleblowers protected by Dodd-Frank exacerbates an ongoing and mature circuit split, see Pet. at 10–16. The Ninth Circuit's decision effectively moots the robust administrative remedies Congress provided whistleblowers like respondent who make internal complaints. And the decision increases the burden on employers by expanding the scope of a new anti-retaliation provision.

The Fifth Circuit and Second Circuit Judge Jacobs ably demonstrate that the plain meaning of Dodd-Frank's whistleblower-protection provision limits that statute's anti-retaliation provision to individuals who have actually provided information related to a securities violation to the SEC. *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623–28 (5th Cir. 2013); *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 156–57 (2d Cir. 2015) (Jacobs, J. dissenting). Indeed, Congress's definition of "whistleblower" in 15 U.S.C. § 78u–6(a)(6) should resolve any perceived tension in the whistleblower-protection provision. See App. 4a, 25a, 26a, 30a, 32a.

The very incongruity of Congress creating a Dodd-Frank end run around the Sarbanes-Oxley Act's comprehensive administrative process reinfor-

ces this plain-meaning analysis of the text. Congress afforded individuals like respondent who make internal reports under Sarbanes-Oxley ample remedies including resort to litigation in federal district court *if the administrative remedies are exhausted*. Dodd-Frank does not require the exhaustion of administrative remedies and provides important benefits to plaintiffs that are unavailable under Sarbanes-Oxley. The Ninth Circuit's expansion of the scope of Dodd-Frank's whistleblower-protection provision thus effectively moots Sarbanes-Oxley's robust administrative-remedy regime for internal whistleblowers.

The Ninth Circuit's expansive reinterpretation of Dodd-Frank "whistleblowers" to include internal reports of fraudulent conduct also imposes an increasingly unmanageable and surprising burden on employers. Given that the internal reporting that the Ninth Circuit's reinterpretation protects includes any internal complaints that an employee *reasonably believes* address fraudulent activity under the federal mail- and wire-fraud statutes (themselves extremely broad), the scope of protected activity is staggeringly broad. Under the Ninth Circuit's ruling, employers must be concerned to avoid even the appearance of retaliation after receiving any internal employee complaint raising questions of dishonest gain. The Ninth Circuit's decision is all the more pernicious because most employers are unlikely to expect that a statutory provision that focuses on protecting employees who report information to the Securities and Exchange Commission is applicable to mundane internal reports, having nothing to do with securities laws.

The Ninth Circuit's decision is not only inconsistent with the text of Dodd-Frank itself. It also undermines the administrative remedies Congress enacted in Sarbanes-Oxley. There is nothing in the text or structure of Dodd-Frank that supports this result. Dodd-Frank focuses on reports to federal authorities, not internal complaints. Thus, only a whistleblower who actually provided information to the SEC can plead a claim for retaliation under Dodd-Frank. The Court should grant the petition and reverse the court of appeals.

ARGUMENT

The Court should grant certiorari to restore Congress's limits on the Dodd-Frank whistleblower-protection provision.

A. The Ninth Circuit's reinterpretation of Dodd-Frank effectively moots Sarbanes-Oxley's administrative remedies.

In Sarbanes-Oxley, Congress adopted a comprehensive administrative process to protect employees, contractors, and subcontractors of publicly traded companies who reported perceived securities violations and fraud to law enforcement, regulatory authorities, Congress, or even the employee's own supervisor. 18 U.S.C. § 1514A(a). This administrative-remedy regime is effectively rendered moot by the expansive reinterpretation of the Dodd-Frank whistleblower-protection provision adopted by the Second and Ninth Circuits. See *Asadi*, 720 F.3d at 629.

The Sarbanes-Oxley anti-retaliation provision requires employees to exhaust administrative

remedies before filing suit against employers. 18 U.S.C. § 1514A(b)(1). To initiate the administrative process, a person alleging retaliation for engaging in activity protected by Sarbanes-Oxley must file a complaint with the Secretary of Labor within 180 days of when the retaliation occurs or the person becomes aware of the retaliation. *Ibid.*; 18 U.S.C. § 1514A(b)(2)(D). The administrative process has three stages.

Initially, the Secretary of Labor makes a preliminary determination as to the merits of the complaint. The Secretary conducts an initial investigation giving the alleged offender and the employer (if the two are different) the opportunity to respond. The Secretary then makes a preliminary determination whether there is reasonable cause to conclude that the complaint has merit. *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating procedures in 49 U.S.C. § 42121(b)). If the Secretary determines the complaint has merit, the Secretary is required to order appropriate relief sufficient to make the employee whole, including reinstatement, back pay, special damages, and attorney fees. *Ibid.*; 18 U.S.C. § 1514A(c). If no party files a timely objection, the Secretary's preliminary determination becomes final and is not subject to judicial review. *Ibid.* (incorporating 49 U.S.C. § 42121(b)(2)(A)).

Next, the parties can obtain a determination by an administrative law judge. The complainant, the alleged offender, and the employer can obtain a hearing before an administrative law judge by filing objections to the Secretary's preliminary determinations within 30 days. 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(2)(A)). After

conducting a hearing, the administrative law judge is required to issue a decision containing "appropriate findings, conclusions, and as order pertaining to the remedies provided . . . as appropriate." 29 C.F.R. § 1980.109(a). If no party petitions for review to the Administrative Review Board, the administrative law judge's decision becomes the Secretary's final order and judicial review is barred. 29 C.F.R. § 1980.110(b).

The last step in the administrative process is potential review by the Administrative Review Board. Any party and the Labor Secretary can petition the Board to review the administrative law judge's decision. 29 C.F.R. § 1980.108, .110(a). The Board exercises discretionary jurisdiction. 29 C.F.R. § 1980.110(b). If the Board accepts a case for review, it generally issues a final decision within 134 days of the date of the administrative law judge's decision. 29 C.F.R. § 1980.110(c). The Board's decision becomes the final decision of the Secretary unless the Board declined to grant review, in which case the administrative law judge's decision becomes the Secretary's final order. 29 C.F.R. § 1980.110(b).

Congress authorized judicial review of a complainant's Sarbanes-Oxley retaliation claim in only two ways. A complainant aggrieved by the Secretary's final order may appeal to the United States Court of Appeals (assuming the appeal has been preserved). 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(4)(A)); 29 C.F.R. § 1980.112. Or a complainant may choose to file suit in the appropriate federal district court if the Secretary of Labor fails to issue a final decision within 180

days of the filing of the complaint. 18 U.S.C. § 1514A(b)(1)(B).

Dodd-Frank provides significantly greater potential benefits to whistleblowers than are afforded by Sarbanes-Oxley. First, Dodd-Frank's whistleblower-protection provision does not require a complainant to subject his or her claims to review by the Department of Labor and wait 180 days before filing suit. *See* 15 U.S.C. § 78u–6(h). Second, Dodd-Frank provides for greater monetary damages by authorizing the recovery of two times the amount of back pay otherwise owed. 15 U.S.C. § 78u–6(h)(C)(ii). Sarbanes-Oxley does not award double damages. 18 U.S.C. § 1514A(c). Third, the statute of limitations under Dodd-Frank is between 6 and 10 years, whereas Sarbanes-Oxley requires complaints to be filed within 180 days. Compare 15 U.S.C. § 78u–6(h)(1)(B)(iii) with 18 U.S.C. § 1514A(b)(2)(D). Accord *Asadi*, 720 F.3d at 629.

To be sure, Dodd-Frank and Sarbanes-Oxley do overlap with regard to individuals who provide information to the SEC or Congress. But this partial overlap likely contributed to the roughly 30% decline in the number of Sarbanes-Oxley retaliation complaints received by the Department of Labor in the years after Dodd-Frank was enacted.[2] The Second and Ninth Circuit's reinterpretation of Dodd-Frank's whistleblower-protection provision is likely to further depress the filing of Sarbanes-Oxley retaliation claims.

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[2] Department of Labor statistics available at http://tinyurl.com/SOX-retal-claims.

Thus, making the whistleblower protections of Dodd-Frank coterminous with the anti-retaliation provision in Sarbanes-Oxley effectively undermines Sarbanes-Oxley's robust administrative-remedy regime.

B. The expansive reinterpretation of Dodd-Frank creates an increased financial burden on employers.

The Ninth Circuit's expansive reinterpretation of Dodd-Frank's whistleblower-protection provisions strips employers of the benefit of an expedited, less costly administrative-resolution process for the exceedingly broad range of internal complaints that may be at issue. This increases the already nigh unmanageable burden imposed on employers, especially for small employers that contract or subcontract for public companies.

The primary focus of Dodd-Frank's whistleblower-protection provision is to protect individuals who provide information to the SEC and other governmental agencies. *Lawson* v. *FMR LLC*, 134 S. Ct. 158, 1175 & n.18 (2014). And it is relatively easy for an employer to enact workplace rules to prevent retaliation on this basis. Indeed, such activity is already protected in various states. See, e.g., Cal. Lab. Code § 1102.5; Mich. Comp. Laws § 15.361 et seq.; N.J. Stat. Ann. § 34:19, et seq.

But when a Dodd-Frank "whistleblower" includes any person who has engaged in activity protected by Sarbanes-Oxley, Dodd-Frank's prohibitions become exceedingly difficult to enact in the workplace. The scope of activity protected by Sarbanes-Oxley includes providing information to an employee's

supervisor that the employee reasonably believes constitutes fraudulent behavior under the federal mail, wire, banking, and securities fraud statutes. 18 U.S.C. § 1514A(a). These statutes "have 'been invoked to impose criminal penalties upon a staggeringly broad swath of behavior.' " *United States* v. *Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting *Sorich* v. *United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1308–11 (2009) (Scalia, J., dissenting from denial of certiorari)). The fraud statutes are "broad enough to include a wide variety of deceptions intended to deprive another of money or property." *United States* v. *Christopher*, 142 F.3d 46, 54 (1st Cir. 1998). Indeed, the scope of the fraudulent activities has perhaps most broadly been defined as being "measured by a nontechnical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play." *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989).

Under Sarbanes-Oxley, because an employee need only report information to a supervisor that the employee *reasonably believes* to constitute a violation of the federal fraud statutes, the scope of protected activity is breathtaking. Consider an employer faced with an employee's report that another employee has been submitting—by email -inflated mileage reimbursement requests. The employer knows that the accusation is false, that the accuser is a poor performer, and that the accuser and the purported pilferer have an acrimonious relationship. Because Sarbanes-Oxley protection extends to internal reports of fraud, the employer cannot take any action that could be perceived as even an indirect threat against the accuser without risking a later

retaliation claim. Indeed, it is only slightly hyperbolic to suggest that a report of just about any dirty deed is protected activity.

To the extent that Sarbanes-Oxley protects internal reports so seemingly unrelated to any securities-law issue, Sarbanes-Oxley imposes that requirement most squarely on public companies. Public companies are more likely to be sophisticated enterprises with corporate compliance sections, human resources departments, and access to accounting and legal professionals. While no doubt imposing a significant burden to train supervisors to avoid taking any adverse action of any kind because an employee raised any complaint raising issues of honesty or integrity, at least public corporations can be expected to have the resources available to comply with the law.

But Sarbanes-Oxley applies more broadly to internal reports made by employees of public companies, private contractors and subcontractors. *Lawson*, 134 S. Ct. at 1161. Unlike most federal anti-retaliation provisions, Dodd-Frank and Sarbanes-Oxley do not contain a minimum size requirement (like Title VII, 42 U.S.C. § 2000e(e)) or a limitation to a specific regulated industry (e.g., the Federal Railroad Safety Act, 49 U.S.C. § 20109). Thus, Dodd-Frank and Sarbanes-Oxley apply to small employers without access to significant resources for corporate compliance, legal advice, and human resources. The Second and Ninth Circuit's expansion of Dodd-Frank imposes more significant compliance burdens (and the risk of double back-pay damages) on small employers that are the least likely to have any reason to expect that a statute

passed in the wake of the most-recent financial collapse contains an whistleblower-protection provision that is applicable to them.

The cost of resolving a retaliation claim is not insubstantial. Already twenty years ago, the costs of litigating a wrongful-discharge action were estimated to be $124,000. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 31–32 (1998). Indeed, the expense of litigating creates a significant pressure to settle even implausible retaliation claims. See Jessica K. Fink, *Protected by Association? The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012).

The effect of the Ninth Circuit's decision is to make the litigation costs unavoidable. Sarbanes-Oxley imposes these burdens on employers in the first instance, albeit with the requirements that the employee first pursue any retaliation claim with the Secretary of Labor and do so quickly. 18 U.S.C. § 1514A(b)(1). This process gives employers the benefit of screening unmeritorious claims and resolving many others in a far less expensive manner than litigation.[3] The Second and Ninth Circuit's decisions increase the burden on employers by effective depriving employees of this process and the requirement that employees assert their claims expeditiously.

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[3] Statistics available at http://tinyurl.com/SOX-retal-claims.

To what end? Congress's focus in adopting Dodd-Frank's whistleblower-protection provision was to protect individuals who report to the government. *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 & n.18 (2014). Nor is there any hue and cry that the business community throughout the country is rife with fraudulent activity. The Second and Ninth Circuit's expansive reinterpretation of whistleblowers under Dodd-Frank serves no discernable purpose that counteracts the tremendous burdens imposed on employers remote from any possibility of securities fraud. Indeed, Sarbanes-Oxley already affords comprehensive remedies for purported whistleblowers like respondent who only make internal reports but with appropriate limitations. The Second and Ninth Circuits' misinterpretation of Dodd-Frank has significant negative ramifications for the nation's employers that should be reversed.

CONCLUSION

For the reasons given above, the Court should grant the petition for certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LIME ENERGY SERVICES COMPANY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Lime Energy Services Company ("Lime Energy") respectfully submits this brief as *amicus curiae* in support of Petitioner Digital Realty Trust, Inc. ("Digital").

Lime Energy is a national provider of energy savings to utility clients under Small Business Direct Install (SBDI) programs. It has a 25-year track record in providing energy efficiency projects to thousands of small business customers annually, completing over 100,000 of such projects for small and mid-sized businesses across the nation since 2009, and helping small and mid-sized businesses gain access to over $272 million in utility incentives.

Lime Energy is also an employer and the defendant in a case before the United States

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its insurance carrier, Chubb, providing defense costs to *amicus* through a policy of insurance, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief. Both Petitioner and Respondent have filed a blanket consent with this Court to the filing of all amicus briefs.

District Court for the District of New Jersey which considered the very issue presented by Digital's petition for a writ of certiorari. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13-14 (D.N.J. Aug. 13, 2015). In *Dressler*, plaintiff was a former employee of Lime Energy who alleges she voiced concerns internally about discrepancies in accounts receivable but who did not go to the SEC. After she was terminated, plaintiff filed a complaint, alleging retaliatory termination in violation of the whistleblower-protection provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank Act"), 15 U.S.C. § 78u-6, *et seq.*[2]

Lime Energy moved to dismiss, arguing that plaintiff did not qualify as a "whistleblower" under the Dodd-Frank Act's anti-retaliation provision because she did not make protected disclosures to the SEC. The district court denied the motion to dismiss, holding that the whistle-blower protections of the Dodd-Frank Act are ambiguous under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

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[2] The whistleblower-protection provisions of the Dodd-Frank Act, Pub. L. No. 111-203, Title IX, § 922(a), 124 Stat. 1376, 1841 (2010), added section 21F to the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u-6.

U.S. 837 (1984), and deferred to the rule promulgated by the SEC (Rule 21F-2(b)(1)) as a reasonable and permissible construction of the Dodd-Frank Act. *See* 2015 U.S. Dist. LEXIS 106532, at *37-41. Litigation is proceeding before the district court, and the parties are in the midst of extensive discovery.

Accordingly, resolution of the question presented by Digital's petition will have a direct impact on the outcome of *Dressler v. Lime Energy*, now before the United States District Court for the District of New Jersey. Moreover, this is an issue of vital concern to the country's business community. The Dodd-Frank Act's anti-retaliation provision has a statute of limitations of 6-10 years. Therefore, Lime Energy is still vulnerable to Dodd-Frank whistleblower claims like the one it currently faces that could potentially be brought by former employees long separated from the company. And each time, absent this Court's action, the varying treatment of the Dodd-Frank Act's whistleblower protections by courts in different jurisdictions will burden Lime Energy, as an employer, with unnecessary cost and administrative complexity, requiring it to assess and predict which side of the circuit split a particular court will follow. Clear guidance from this Court is necessary so that Lime Energy, and companies like it, clearly

understand which employees fall within the Dodd-Frank Act's definition of "whistleblower" and what the relationship is between the anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, with the assurance that the same standards apply uniformly across the country.

SUMMARY OF ARGUMENT

Lime Energy, as the undersigned *amicus*, urges this Court to grant Digital's petition. Lime Energy has found itself embroiled in litigation based on the question presented by Digital's certiorari petition, and it thus serves as a concrete example of the problems created by the decision below. In *Dressler v. Lime Energy*, as in this case, the plaintiff allegedly raised concerns internally about alleged misconduct but admittedly never reported those concerns to the SEC. Nevertheless, after Dressler was terminated, she sued two years later in federal court under the Dodd-Frank Act. The district court denied Lime Energy's motion to dismiss and held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, that the retaliation provision of the Dodd-Frank Act is ambiguous, and accorded *Chevron* deference to the SEC's regulation, which took the position that internal complaints are sufficient to qualify a plaintiff as a Dodd-Frank "whistleblower."

Absent the district court's holding, Dressler's lawsuit would have been time-barred due to the differences between the statute of limitations contained in the Dodd-Frank Act (between six and ten years) and the Sarbanes-Oxley Act (six months). Dilatory and opportunistic plaintiffs are incentivized by the decision below and decisions like it. The *Dressler* litigation is ongoing, and the parties are currently engaged in extensive discovery.

The circuit split underlying Digital's petition is well defined. The Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, the only circuit court to have ruled at the time of the *Dressler* decision, took a textualist approach, respecting the integrity of the definition of "whistleblower" in the Dodd-Frank Act, which is clear and unambiguous. In contrast, the Second Circuit in *Berman v. Neo@Ogilvy LLC* came to the opposite conclusion, abandoning the clear statutory definition in favor of "the realities of the legislative process," which it stated gave rise to an "arguable tension" between statutory provisions. According to the Second Circuit, this arguable tension constituted sufficient ambiguity to trigger *Chevron* deference to the SEC's regulation. The decision below explicitly followed *Berman*'s application of *Chevron* deference to the regulation. The circuit conflict regarding what consti-

tutes a Dodd-Frank "whistleblower" is pressing, and this Court's intervention is needed.

The petition also presents an opportunity to resolve uncertainty about the future of the doctrine of *Chevron* deference, which seems to have an increasing number of critics, both in the courts and in the academy. This case can and should be decided on the basis of the plain language of the statute, but if the Court disagrees, the case would present an opportunity for the Court to provide guidance on the scope of *Chevron* deference doctrine: *e.g.*, its role with respect to separation of powers, the degree of statutory ambiguity required to trigger its application, and the necessity for institutional expertise outside the context of highly specialized or technical matters. The Court should grant Digital's petition for a writ of certiorari.

ARGUMENT

I. Lime Energy's Predicament Illustrates the Burdens Placed on Employers by Judicial Deference to the SEC Regulation.

Lime Energy provides the Court with a concrete example of the burdens faced by national employers in light of judicial deference to

the SEC's regulation (Rule 21F-2(b)(1)),[3] and how critically important it is that the issue be resolved so that consistency and predictability across jurisdictions become the norm.

Wendy P. Dressler, plaintiff in *Dressler v. Lime Energy*, was initially hired as an administrator of the public sector for New York projects but later held the position of accounting manager of the utilities division. *Dressler v. Lime Energy*, No. 3:14-cv-07060, Dkt. No. 1, Compl. ¶¶ 3-9 (Nov. 10, 2014). She alleges she raised concerns internally about discrepancies in the company's accounts receivable but admittedly did not go to the SEC. *Id.* ¶¶ 15-17, 25, 28, 30, 34, 38, 40. She further alleges she was terminated as a result. *Id.* ¶ 2.

On July 17, 2012, Lime Energy issued a press release advising that it had discovered misreporting that might require restatement of

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[3] "[B]y providing that an individual is a 'whistleblower if they 'provide information in a manner described in' Subsection (iii) of Section 78u-6(h)(1)(A) [of the Dodd-Frank Act], Rule 21F-2(b)(1) stipulates that the whistleblowing-protection program of the [Dodd-Frank Act] does *not* require an employee to report violations directly to the SEC." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13 (D.N.J. Aug. 13, 2015) (citations omitted).

affected financial statements. *Id.* ¶ 44. On November 5, 2012, Dressler and other employees were terminated as the result of an internal investigation. *Id.* ¶ 47. Dressler's complaint does not allege that at any time she submitted any documents or contacted the SEC regarding her accounting concerns.

The District Court nonetheless found that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, holding that the whistleblower-protection provision of the Dodd-Frank Act is ambiguous under *Chevron* and deferring to the SEC's regulation as "a reasonable and permissible construction of the Dodd-Frank Act's whistleblower protection provision." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *37-42 (D.N.J. Aug. 13, 2015). After Lime Energy's motion to dismiss was denied, the case entered an extensive discovery phase.

Although Dressler was terminated on November 5, 2012, she did not file her complaint with the District Court until November 10, 2014. Dressler thus is the perfect example of a plaintiff who could not sue under the Sarbanes-Oxley Act, but who *could* sue under the Dodd-Frank Act because the District Court held she was a Dodd-Frank "whistleblower." The statute of limitations for the Sarbanes-Oxley Act is only

six months, *see* 18 U.S.C. § 1514A(b)(2)(D), so under that statute, Dressler's lawsuit would have been time-barred. In marked contrast, the statute of limitations for the Dodd-Frank Act is between *six and ten years*. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Because the District Court held that, despite failing to raise her concerns with the SEC, Dressler was a "whistleblower" under the Dodd-Frank Act, she was able to file her claim in federal court.

Moreover, the Dodd-Frank Act allowed her to bring a retaliation claim in the District Court in the first instance, *see* 15 U.S.C. § 78u-6(h)(1)(B)(i), whereas the Sarbanes-Oxley Act would have required her to first exhaust her administrative remedies by filing a complaint with the Department of Labor, *see* 18 U.S.C. § 1514A(b)(1). The differences between the statutes are no accident; rather, the language in the Dodd-Frank whistleblower provision was the result of a conscious strategy to award financial incentives and additional protections to complainants who adhered to Dodd-Frank procedures, including the requirement to directly re-

port to the SEC, in order to increase the amount and caliber of the complaints made to the SEC.[4]

In sum, Dressler's lawsuit was saved by the District Court's finding that she was a Dodd-Frank Act "whistleblower," placing the viability of her claim squarely within the ambit of the question presented by Digital's petition. Her case illustrates the dramatic expansion accomplished by the SEC's regulation, by the decision below in deferring under *Chevron* to that regulation, and by the Second Circuit's decision

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[4] Indeed, the principal purpose of the Dodd-Frank whistleblower provision, according to the SEC, was "to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the *Commission* . . . providing information to persons conducting an *internal investigation* may not . . . achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff." 76 Fed. Reg. at 34,308 (emphases added); *see also* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make *awards that are sufficiently robust* to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.") (emphases added).

in *Berman* which underlies the circuit split in this case.[5] And all in the face of an unambiguous, clear statutory definition.

II. Certiorari Is Warranted To Resolve a Widely Recognized Circuit Split and To Clarify that the SEC's Regulation Does Not Warrant *Chevron* Deference in Light of the Unambiguous Statutory Definition of "Whistleblower."

The lines between the two sides of the circuit split that gave rise to Digital's petition are clearly drawn. As noted by Petitioner, the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), took a textualist approach, concluding that the definition of "whistleblower" in the Dodd-Frank Act "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower.'" *Id.* at 623; *see also* Pet. 10-12. Because it relied on the words of the statute to conclude that the statute was unambiguous, the Fifth Circuit did not consider the issue of deference to the SEC's interpretation—there was

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[5] Moreover, the Dodd-Frank Act provides that whistleblowers can seek double backpay, *see* 15 U.S.C. § 78u-6(h)(1)(C), but they may not do so under the Sarbanes-Oxley Act, *see* 18 U.S.C. § 1514A(c).

no reason to proceed from Step 1 of *Chevron* (unambiguous statutory language) to Step 2 (deference to the administrative agency due to ambiguous statutory language). *See* 720 F.3d at 630 ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)). Under the first step of *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In contrast, the Second Circuit relied heavily on the doctrine of *Chevron* deference in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), which led it to the opposite conclusion and created the circuit split. *See id.* at 154-55. The decision found ambiguity in the "*arguable tension* between the definition subsection [of the Dodd-Frank Act], subsection 21F(a)(6), which defines 'whistleblower' to mean an individual who reports violations to the [SEC], and subdivision (iii) of subsection 21F(h)(1)(A), which, unlike subdivisions (i) and (ii), does not within its own terms limit its protection to those

who report wrongdoing to the SEC." 801 F.3d at 147 (emphasis added); *see also* Pet. 2 (setting out codified versions: 15 U.S.C. § 78u-6(a)(6) and 15 U.S.C. § 78u-6(h)(1)(a)). Specifically, "subdivision (iii) expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and those provisions, which contemplate an employee reporting violations internally, do not require reporting violations to the [SEC]." 801 F.3d at 147. The Second Circuit identified "the precise issue . . . [a]s whether [this] arguable tension . . . creates sufficient ambiguity . . . to oblige us to give *Chevron* deference to the SEC's rule." *Id.* at 148. The Second Circuit held that it did. *Id.* at 155.

The rule provides a different definition of "whistleblower," which rests on the *activity* protected by the anti-retaliation provision rather than the statutory definition of "whistleblower." 17 C.F.R. 240.21F-2(b)(1)(ii); Pet. 5. Its effect is to extend protections to those who make disclosures of suspected violations internally as well as to those who make disclosures to the SEC. Despite this aspect of the SEC's regulation, the Second Circuit determined that *Chevron* deference to the SEC's regulation was warranted. 801 F.3d at 155.

The Second Circuit's Step 2 *Chevron* analysis was not appropriate given the unambiguous nature of the Dodd-Frank whistleblower definition. In a portion of its holding, the Ninth Circuit's decision below explicitly followed *Berman*, applying *Chevron* deference to the regulation. Pet. App. 10a-11a ("We also agree with the Second Circuit that even if the use of the word "whistleblower" in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference.").

But the foundation upon which the Second Circuit's decision rests is faulty. *See* 801 F.3d at 158 (Jacobs, J., dissenting) ("[T]he majority has no support for the proposition that when a plain reading of a statutory provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous."). The Second Circuit explained its decision by referring to the "realities of the legislative process." 801 F.3d at 154. Setting aside the canon that "terms of a definitional subsection are usually to be taken literally," the Second Circuit focused instead on "whether the [statutory] definition should apply to a late-added subdivision of a subsection that uses the defined term." *Id.* It justified its aban-

donment of the statutory definition by explaining that "[w]hen conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." 801 F.3d at 154.

Noting that "[t]rue ambiguity is almost always the result of carelessness or inattention," *id.* at 154 n.10 (quoting ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW 33 (2012)), the Second Circuit was persuaded that neither the text nor any legislative history resolved whether those "conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted" by the statutory definition. *Id.* at 155. Absent that knowledge, the Second Circuit determined that the tension between the provisions, notwithstanding its prior description of that tension as "arguable," created sufficient ambiguity to trigger the doctrine of *Chevron* deference. From there, it was quick work to conclude that an employee's internal reporting to his employer was sufficient to invoke Dodd-Frank remedies

for alleged retaliation, despite not having reported to the SEC.

The Fifth Circuit's structural analysis makes far more sense and is faithful to the statutory scheme, distinguishing between Dodd-Frank's definition of a "whistleblower" and the three categories of protected activity. *Asadi*, 720 F.3d at 626 ("[T]he definition of 'whistleblower' and the third category of protected activity do not conflict. Conflict would exist between these statutory provisions only if we read the three categories of protected activity as additional definitions of three types of whistleblowers."). Further, although much is made in other opinions of the dearth of legislative history, the Fifth Circuit noted that the "legislative history indicates that Congress specifically rejected a broader description of individuals eligible to raise claims under the whistleblower protection provision. Specifically, GE Energy explains that the bill initially passed by the House did not use the term 'whistleblower' in describing the individuals protected from employer retaliation; instead, it used the phrase 'employee, contractor, or agent.'" 720 F.3d at 626 n.9 (quoting Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(g)(1)(A) (as passed by House, Dec. 11, 2009)). However, "[t]he Senate's subsequent version of the bill re-

placed the use of the phrase 'employee, contractor, or agent' with 'whistleblower' and restructured the format of the provision to resemble the enacted version." 720 F.3d at 626 n.9 (quoting Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(h)(1)(A) (as passed by Senate, May 20, 2010)).[6]

The Fifth Circuit's textual analysis was the correct one, but in the event the Court is persuaded that tension exists that rises to the level of ambiguity, the next source to mine for the intent of the legislature should be legislative history rather than judicial conjecture about the "realities of the legislative process." *Berman*, 801 F.3d at 154; *see also id.* at 158 (Jacobs, J., dissenting) ("The U.S. Code is full of statutory provisions with 'extremely limited' effect; there is no canon that counsels reinforcement of any sub-sub-sub-subsection that lacks a paradigm shift. The majority is thrown back on what it calls euphemistically 'the realities of the legisla-

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[6] Because the Fifth Circuit in *Asadi* relied on the plain, unambiguous statutory language to reach its conclusion, it did not rely on this legislative history in its analysis, 720 F.3d at 626 n.9, although clearly it was deemed worthy of mention.

tive process.'"). The contrasting language in successive bills noted by the Fifth Circuit in *Asadi* and the substitution of the "whistleblower" term for the language of "employee, contractor, or agent" that came with the enactment of the Senate bill indicates that Congress intended to reject the broader description of those eligible for whistleblower protection under the Dodd-Frank Act. *Id.*

The Second Circuit erred: first, the text is clear, and second, some legislative history does exist that more than hints at the answer. *Compare Berman*, 801 F.3d at 155; *see id.* at 160 (Jacobs, J., dissenting) (noting that plain statutory text should not be "cast aside . . . just because [judges] harbor 'doubt[s]' about what was going on in the heads of individual 'conferees' during the legislative process") (citation omitted). Now that the Ninth Circuit has entered the fray, certiorari is warranted in order to resolve the deep and intractable conflict among the circuits.

III. If the Court Finds the Statutory Language Ambiguous, It Could Grant Certiorari To Clarify the Scope of the Doctrine of *Chevron* Deference.

This case can be, and should be, readily decided, as the Fifth Circuit did in *Asadi*: on

the basis of the plain language of the statute. The Second Circuit's decision in *Berman* found ambiguity where there was none and rested its decision on generalities about the legislative process, doubts, and speculation. However, the petition also presents the Court with an opportunity to refine and limit *Chevron*, should it wish to do so.

Few doctrines have been as controversial in recent years as those applying various degrees of deference to the positions of federal administrative agencies. What was envisioned by supporters of the doctrine in past decades as a sensible delegation to an administrative agency made up of subject-matter experts is increasingly described as a threat to the separation of powers. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2014) (Thomas, J., concurring) ("When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against. *See* THE FEDERALIST NO. 47, at 302 (J. Madison).").

Increasingly, members of this Court and others have described some discomfort with the doctrine. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring)

(writing separately to note that *Chevron* deference "raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("the danger posed by the growing power of the administrative state cannot be dismissed."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (describing the *Chevron* doctrine as the "elephant in the room," allowing executive agencies to "swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *cf. Perez*, 135 S. Ct. at 1211-12 (Alito, J., concurring in part and concurring in the judgment) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. . . . The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."); *id.* at 1213-14 (Thomas, J., concurring).[7]

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[7] Over the years, the academy has not been shy about criticizing the *Chevron* doctrine either. *See, e.g.*, Philip

Others have suggested pruning rather than eliminating the doctrine. *See, e.g., Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring). In *Egan*, for example, Judge Jordan's concurrence gave the following examples of times when agency expertise is valuable: "the Federal Energy Regulatory Commission is well qualified to determine what is the 'just and reasonable' rate that utilities should pay when purchasing energy from other energy-producing facilities. Likewise, the Treasury Department is in a good position to say whether certain revenue qualifies as 'reserve strengthening.' And the Department of Energy can helpfully suggest whether 'oil produced from tar sands' includes oil produced using enhanced extraction techniques." *Id.* at

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Hamberger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM L. REV. 1727 (2010); Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678-80 (2007); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994).

281 (citations omitted). However, "[h]ighly specialized or technical matters are far different . . . than the legal matters on which federal courts are now routinely told, in the name of *Chevron*, to bow down and obey the executive branch." *Id.* at 281-82 (using as an example the Department of Labor's decision about which provision of the FMLA the court was "supposed to interpret . . . the rules of proof regarding such a claim and the kind of jury instruction that must be given. So much for the job of the judicial branch.").

So, too, here: the SEC in its regulation put aside the clear, unambiguous statutory definition ("whistleblower") that Congress said was to be used throughout the section, instead developing two separate definitions for "whistleblower," depending on which section of the statute contains the word. The SEC has no particular expertise in determining a statute's scope of coverage, and the statute's plain terms leave the SEC no leeway to change the meaning of "whistleblower." Yet the SEC did so, expanding the scope of the definition such that it is at odds with the statute.

The subject matter is important, the circuit split is mature and deep, and as Petitioner has noted, the dockets of the lower courts are filling up with such cases. Pet. 16-17. National

employers are faced with varying treatment of anti-retaliation plaintiffs turning solely on the incident of geography—in some circuits, those who have not reported alleged misconduct to the SEC may proceed under the Dodd-Frank Act, and in other circuits, they may not. In order to resolve the ensuing uncertainty and to assure a uniform approach across the nation, certiorari is warranted.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, this Court should grant Digital's Petition for a Writ of Certiorari.

Respectfully submitted,

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on whether this Court should grant certiorari to decide whether the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), codified at 15 U.S.C. § 78u-6(h), applies to employees who have not reported a violation of the securities laws to the Securities and Exchange Commission, when Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]?" 15 U.S.C. § 78u-6(a)(6).[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored their amicus brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), amici state that they have provided counsel for each party with timely written notice of their intent to file this brief, and that counsel for each party has filed with the Court a blanket letter of consent to the filing of amicus briefs.

include both large and small businesses located primarily in the New England region.

AIM is a 100-year-old nonprofit, nonpartisan association, with over 4,500 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to enforcing federal employment-related statutes according to their terms. When, as here, a statute provides a specific and unambiguous definition of a term, that definition must apply wherever the term appears in the statute. Any change to the statute must come from the Legislature, not the Judiciary.

In addition to this amicus brief, amici have filed many other related amicus briefs in this Court, arguing for the enforcement of federal statutes according to their terms.[2]

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding whether to grant certiorari in this case.

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[2] *See, e.g., Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

SUMMARY OF ARGUMENT

At issue is the meaning of Dodd-Frank's protection of "a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act [SOX] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6). SOX, however, protects employees who report securities law violations to their employer. And the lower court interpreted the disputed language to mean that Dodd-Frank protects the employee who only reports a securities law violation to his employer, pursuant to SOX.

This Court should grant certiorari and decide, to the contrary, that the disputed language only protects the Dodd-Frank "whistleblower" (i.e., the employee who reports information to the SEC) who *also* reports that information to his employer and who then suffers retaliation for his internal reporting. The language is unambiguous and affords this one meaning only.

This language would apply when the employer does not know that the employee who has reported internally has also reported to the SEC. Without this disputed language, a Dodd-Frank whistleblower would not be protected under Dodd-Frank for his internal reporting. He would only be protected under SOX. The language therefore encourages an employee to report both internally and externally.

The lower court apparently rejected the statute's plain meaning as being "narrow[] to the point of absurdity . . . ." Appendix to Petitioner's Petition for Certiorari (App.) 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort, however narrow it may appear. Nor is it a court's role to conform an unambiguous statute such as this one to the court's own notion of what Congress may have intended. Any change must come from Congress, not the courts.

In any event, protecting such a class of Dodd-Frank whistleblowers is hardly "absurd." Consistent with SOX's purposes, an employee may wish to report a potential violation to her employer, for speedy internal resolution of the matter. But, consistent with Dodd-Frank's purposes, the employee may also wish to alert the SEC to the matter, to secure her right to pursue Dodd-Frank's unique financial incentives (a potentially large bounty) and legal protections (including the right to recover double back pay). Nor is it "absurd" that an employer may not know that the employee who has reported a violation internally has also reported it to the SEC. Dodd-Frank and the SEC regulations preserve the confidentiality of a whistleblower's identity.

The Ninth Circuit engaged in impermissible judicial legislation, effectively by substituting the word "employee" for the defined term "whistleblower." But the statutory definition of "whistleblower" excludes all other possible meanings of that term. Moreover, Congress chose the word "employee" in SOX's whistleblower provision but did

not do so when it later enacted Dodd-Frank. It must be presumed that this choice was deliberate.

If allowed to stand, the lower court's decision would eviscerate Dodd-Frank's definition of a whistleblower. But it would also contravene Congress' purpose of linking Dodd-Frank's robust financial incentives with its robust remedial protections. In the lower court's view, an employee can sue for retaliation under Dodd-Frank even though he is not eligible for a bounty under that statute. But those incentives and remedies go hand in hand and were expressly limited to the employee who has earned them by reporting information to the SEC.

The lower court's approach could also render SOX's whistleblower provision virtually obsolete. Now any employee who reports internally could avoid suing under SOX and could sue instead under Dodd-Frank, to benefit from its unique remedial protections. But Congress indicated no such intent to undermine the viability of a SOX whistleblower claim when it enacted Dodd-Frank. To the contrary, Congress carefully *preserved* SOX's whistleblower provision in Dodd-Frank, by expanding SOX's administrative limitations period.

In effect, Congress has enacted a two-tiered statutory scheme for the protection of corporate whistleblowers. If the employee only reports to her employer, then SOX applies. If, however, the employee also reports to the SEC, then she is a "whistleblower" under Dodd-Frank and is eligible to receive a substantial bounty and substantial legal

protection for her efforts. Therefore, the Court should grant certiorari and rule that Dodd-Frank's anti-retaliation provision is limited, by its own plain terms, to the employee who reports information to the SEC.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT THE DODD-FRANK ACT, BY ITS OWN PLAIN TERMS, ONLY PROTECTS EMPLOYEES WHO REPORT SECURITIES LAW VIOLATIONS TO THE SECURITIES AND EXCHANGE COMMISSION.

A. Dodd-Frank Defines A "Whistleblower" As An Employee Who Reports Information To The SEC, and This Definition Must Apply Each Time The Word "Whistleblower" Occurs In The Statute.

At issue is the meaning of language in the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), that prohibits an employer from retaliating against "a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 *et seq.*) ["SOX"]. . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). The same provision defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the

securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6).

SOX, however, protects employees who report securities law violations to their employer. 18 U.S.C. § 1514A(a)(1)(C).[3] And the Ninth Circuit in this case interpreted the disputed language to mean that Dodd-Frank protects the employee who only reports securities law violations to her employer, pursuant to SOX. Appendix to Petitioner's Petition for Certiorari ("App.") 7a-10a.

This Court should grant certiorari and decide, to the contrary, that the disputed language only protects the Dodd-Frank "whistleblower" (i.e., the employee who reports information to the SEC) who *also* reports that information to his employer and who then suffers retaliation for his internal reporting. 15 U.S.C. § 78u-6 (a)(6). "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

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[3] To be precise, SOX protects an employee from workplace discrimination when he reports to "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (B) a person with supervisory authority over the employee . . . ." 18 U.S.C. § 1514A(a)(1)(A)-(C).

In particular, § 78u-6(h)(1)(A)(iii) provides:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, *a whistleblower* in the terms and conditions of employment *because of any lawful act done by the whistleblower*-- . . .
>
> **(iii)** *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* (15 U.S.C. 7201 *et seq.*) [SOX] . . . .

15 U.S.C. § 78u-6(h)(1)(A)(iii) (emphasis added).[4] SOX, it has been noted, protects an employee who

---

[4] This subsection provides, in full:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner

reports a securities law violation to her employer. 18 U.S.C. § 1514A(a)(1)(C).

And so, making the necessary substitutions to this disputed statutory language yields the following result:

> No employer may . . . discriminate . . . against [any individual who provides . . . information relating to a violation of the securities laws to the [SEC]] . . . because of any lawful act done by th[at] [individual] . . . in making [internal] disclosures that are . . . protected under [SOX] . . . .

> discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*) [SOX], this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii).

15 U.S.C. § 78u-6(a)(6), (h)(1)(A)(iii). That is, Dodd-Frank protects an employee from retaliation when he "provides information . . . to the SEC" but also "mak[es] internal disclosures" of the same information to his employer, and his employer retaliates against him "because of" his internal disclosures.

B. The Disputed Statutory Language Affords Only One Meaning: The Employee Who Reports Information Both To His Employer And The SEC Is Protected From Retaliation Because Of His Internal Reporting.

The disputed statutory language is unambiguous and affords only one meaning. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation and internal quotation marks omitted). The language simply provides Dodd-Frank protection to the Dodd-Frank whistleblower who also reports that information to his employer and who then suffers retaliation for his internal reporting. This would apply when the employer does not know that the employee who has reported information internally has also reported that information to the SEC. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013) (discussing same). Without this disputed language, a Dodd-Frank whistleblower would not be protected under Dodd-Frank for his internal

reporting.[5] He would only be protected under SOX. *See* 18 U.S.C. § 1514A(a)(1)(C). And so this language encourages the employee to report potential violations both to his employer and the SEC.

The Ninth Circuit was apparently unwilling to accept the plain meaning of § 78u-6(h)(1)(A)(iii). Indeed, the lower court rejected this protected class of Dodd-Frank whistleblowers as being "narrow[] to the point of absurdity . . . ." App. 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort, however narrow it may appear. "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). After all, in matters of economic regulation, Congress is free to define a protected class as narrowly as it chooses. "[Legislative] reform may take one step at a time." *United States v. Morrison*, 529 U.S. 598, 631 n.2 (2000) (citation and internal quotation marks omitted).[6] *See also Great-W. Life & Annuity Ins. Co.*

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[5] *See* n.4, above. The other categories of protected activity under Dodd-Frank apply only when an employee has supplied information to the SEC or has participated in an SEC enforcement action based on that information. *See* 15 U.S.C. § 78u-6(h)(1)(A)(i)-(ii).

[6] By the same token, it should be of no consequence here that auditors and attorneys may not qualify for protection under § 78u-6(h)(1)(A)(iii), due to those professionals' internal reporting obligations under SOX that might delay or preclude them from reporting the same information to the SEC. *See* App. 6a-7a (Ninth Circuit discussing same as reason for extending § 78u-6(h)(1)(A)(iii) to employees who make only internal reports). In any event, auditors and attorneys would

v. Knudson, 534 U.S. 204, 217–18 (2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done [here, to extend legal protection to the employee who reports both to the SEC and his employer] devoid of reason and effect.").

Nor is it a court's role to "rewrite" an unambiguous statute to fit the court's own notion of what Congress may have had in mind, as the Ninth Circuit did here when it extended the disputed language to employees who are not Dodd-Frank whistleblowers. "It is not our role to conform an unambiguous statute to what we think Congress probably intended . . . ." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (internal quotation marks omitted).

C. Dodd-Frank's Protection Of The Employee Who Reports Both To His Employer and The SEC Serves The Statute's Purpose Of Motivating Corporate Insiders To Assist The SEC In Its Law Enforcement Efforts.

In any event, Dodd-Frank's protection of employees who report both to the SEC and their employers is hardly "absurd." "We cannot say that [affording protection to such an employee] is so bizarre that Congress could not have intended it." *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (citation and internal quotation marks omitted).

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still be protected under SOX for their internal reporting. 18 U.S.C. § 1514A(a)(1)(C).

For instance, an employee may choose to report a potential violation to her employer, to bring the matter to its immediate attention for quick internal resolution. After all, SOX was enacted precisely to encourage and protect such internal reporting. *See* 18 U.S.C. § 1514A(a)(1)(C). But that same employee may also wish to alert the SEC to the matter at this early stage, to secure her right to pursue Dodd-Frank's unique financial incentives and legal protections. Indeed, Congress enacted Dodd-Frank in response to the 2008 financial crisis, and the whistleblower provision was designed precisely to motivate corporate insiders to come forward and report potential securities law violations to the SEC, in order to assist that agency in enforcing the securities laws.[7]

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[7] In fact, Congress received testimony that the SEC depended primarily on the tips of corporate insiders to identify and successfully prosecute claims of securities fraud. S. Rep. 111-176, at 110-11 (2010) ("In a testimony for the Senate Banking Committee, Certified Fraud Examiner and Madoff whistleblower Harry Markopolos testified in support of creating a strong Whistleblower Program. He cited statistics showing the efficiency of Whistleblower Programs: '*whistleblower tips detected 54.1% of uncovered fraud schemes in public companies.* External auditors, and the SEC exam teams would certainly be considered external auditors, detected a mere 4.1% of uncovered fraud schemes. *Whistleblower tips were 13 times more effective than external audits, hence my recommendation to the SEC to encourage *111 the submission of whistleblower tips.*' In his letter to Senator Dodd, SEC Inspector General David Kotz also recommended a similar Whistleblower Program.") (emphasis added).

In particular, § 78u-6 requires the SEC to award the Dodd-Frank whistleblower a substantial bounty if her reporting of original information to that agency results in a successful administrative or judicial enforcement action. 15 U.S.C. § 78u-6(b).[8] And if an employee who reports a violation internally delays too long in reporting that information to the SEC, the SEC may learn of the information from another source. At that point, the information would no longer be "original" under Dodd-Frank and the employee would no longer qualify for a bounty.[9]

Section 78u-6 also provides the Dodd-Frank whistleblower with generous legal protection. In particular, the Dodd-Frank whistleblower enjoys a direct right of action in federal court to recover double back pay, subject to a generous six-year limitations period that can be tolled for up to ten

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[8] Section 78u-6(g) creates the SEC Investor Protection Fund. Section 78u-6(b), in turn, requires the SEC to pay a whistleblower an award from that fund, in an amount between 10% and 30% of the penalties collected by the SEC in a "covered judicial or administrative action" resulting from "original information" provided by that whistleblower. 15 U.S.C. § 78u-6(b)(1)(A)-(B).

"Original information" is information that "is derived from the independent knowledge or analysis of a whistleblower . . . and . . . is not known to the Commission from any other source . . . ." 15 U.S.C. § 78u-6(a)(3)(A)-(B). A "covered judicial or administrative action," in turn, is "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. § 78u-6(a)(1).

[9] *See* n.8, above.

years. 15 U.S.C. § 78u-6(h).[10] By contrast, SOX offers none of these protections.[11] And so the employee who reports to her employer, as a SOX whistleblower, would want to qualify quickly as a Dodd-Frank whistleblower (by reporting to the SEC), before her employer may take any adverse action against her due to her internal reporting.

In short, Dodd-Frank provides the employee who reports information to her employer, and is thus a SOX whistleblower, with strong incentives to report that same information promptly to the SEC and thereby qualify as a Dodd-Frank whistleblower.

Nor is it "absurd" to assume that an employer may not know that the employee who has reported a violation internally has also reported it to the SEC.

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[10] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (providing private right to sue in federal court for retaliation for engaging in protected activity, as defined in § 78u-6(h)(1)(A)(i)-(iii)); § 78u-6(h)(1)(B)(iii)(I)-(II) (providing statute of limitations of six years after date of violation, tolled by three years after date "when facts material to the right of action are known or reasonably should have been known," and capped by ten-year statute of repose); § 78u-6(h)(1)(C)(i)-(iii) (providing prevailing employee with reinstatement, double back pay, litigation costs, expert witness fees, and reasonable attorneys' fees).

[11] Under SOX, for example, the employee has no direct right of action and must instead file a claim with the Secretary of Labor before obtaining the right to sue in federal court. 18 U.S.C. § 1514A(b)(1)(A). And that administrative filing requirement is subject to a clipped 180-day limitations period. 18 U.S.C. § 1514A(b)(2)(D). Finally, while the prevailing employee may recover compensatory and special damages under SOX, she cannot recover multiple damages. *See* § 18 U.S.C. § 1514A(c)(1)-(2).

This is because Dodd-Frank preserves the confidentiality of a whistleblower's identity when she reports to the SEC, unless and until the disclosure of her identity is necessary in the SEC's enforcement action. 15 U.S.C. § 78u-6(h)(2)(A).[12]

In sum, the plain meaning of the disputed language is far from "absurd" and actually serves the twin aims of SOX and Dodd-Frank by encouraging an employee to report violations of the securities laws both to his employer and to the SEC.

II. THE NINTH CIRCUIT ENGAGED IN IMPERMISSIBLE JUDICIAL LEGISLATION BY EXTENDING DODD-FRANK'S WHISTLEBLOWER PROVISION TO EMPLOYEES WHO ARE NOT DODD-FRANK WHISTLEBLOWERS, THEREBY CONTRAVENING THE STATUTE'S LANGUAGE AND PURPOSE.

Having rejected § 78u-6(h)(1)(A)(iii)'s plain meaning, the Ninth Circuit then engaged in impermissible judicial legislation, by extending Dodd-Frank's whistleblower provision to employees who are not Dodd-Frank whistleblowers. In effect, the lower court substituted the word "employee" for the defined term "whistleblower." *See* App. 8a.

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[12] Moreover, the SEC allows whistleblowers to report tips through its confidential website and ensures that "[t]he SEC treats all tips, complaints and referrals as confidential and nonpublic, and does not disclose such information to third parties, except in limited circumstances authorized by statute, rule, or other provisions of law." https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited, May 24, 2017).

But the lower court had no business making such a change because "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987). See also *Arthur Andersen LLP*, 556 U.S. at 631 ("It is not our role to conform an unambiguous statute to what we think Congress probably intended . . . .") (internal quotation marks omitted).

Moreover, Congress chose the word "employee" in SOX's whistleblower provision, 18 U.S.C. § 1514A(a), but it did not do so when it later enacted § 78u-6 in Dodd-Frank. It must be presumed, then, that Congress's omission of the word "employee" in Dodd-Frank was deliberate. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal punctuation marks omitted).

If allowed to stand, the lower court's decision would clearly eviscerate Dodd-Frank's definition of a whistleblower. But it would also contravene Congress' clear purpose of linking Dodd-Frank's robust financial incentives with that statute's robust remedial protection.[13] After all, the provision is titled "Securities whistleblower incentives *and* protection." 15 U.S.C. § 78u-6 (emphasis added). True to its title, § 78u-6 expressly limits its financial incentives and legal protection to the securities

[13] *See* notes 8 and 10, above.

"whistleblower," defined as the employee who reports to the SEC. Those incentives and remedies clearly go hand in hand.

In Congress's judgment, then, only a Dodd-Frank whistleblower should be entitled to that statute's generous incentives and related remedial protections. But the lower court has subverted this statutory purpose by severing the one from the other. In the Ninth Circuit's view, an employee may sue for retaliation under Dodd-Frank even though he is not a Dodd-Frank whistleblower and therefore does not qualify for a financial reward.

Moreover, the lower court's interpretation could effectively render SOX's whistleblower provision obsolete. Now any employee who reports internally could avoid suing under SOX and could sue instead under Dodd-Frank, to benefit from its unique remedial protections. But Congress indicated no such intent to undermine the viability of a SOX whistleblower claim when it enacted Dodd-Frank. To the contrary, Congress carefully *preserved* SOX's whistleblower provision in Dodd-Frank, by expanding SOX's administrative limitations period from 90 to 180 days. *See* Investor Protection and Securities Reform Act of 2010, Pub. L. No. 111-203, § 922(c), 124 Stat. 1848 (2010) (codified at 18 U.S.C. § 1514A(b)(2)(D)).

In sum, Congress has enacted a two-tiered statutory scheme for the protection of corporate whistleblowers. If the employee only reports the securities violation to her employer, then SOX applies. If, however, the employee also reports the

securities violation to the SEC, then he is a "whistleblower" under Dodd-Frank and becomes eligible to receive a substantial bounty and substantial legal protection for his efforts. Courts should preserve this dual statutory scheme by enforcing Dodd-Frank according to its terms.

Therefore, the Court should grant certiorari and rule that § 78u-6(h)(1)(A)(iii) applies, by its own plain terms, to the employee who reports a securities law violation both to his employer and the SEC. "We must presume that the legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citation and internal punctuation marks omitted).

CONCLUSION

For the reasons stated above, amici respectfully request that this Court grant the petitioner's petition for certiorari.

Respectfully submitted,

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DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act extends to individuals who have not reported a violation of the securities laws to the Securities and Exchange Commission and thus fall outside the Act's definition of a "whistleblower."

CORPORATE DISCLOSURE STATEMENT

Petitioner Digital Realty Trust, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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In the Supreme Court of the United States

No. 16-1276

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 850 F.3d 1045. The order of the district court denying petitioner's motion to dismiss (Pet. App. 12a-47a) is reported at 119 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2017. The petition for a writ of certiorari was filed on April 25, 2017, and granted on June 26, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, codified at 15 U.S.C. 78u-6, provides in relevant part:

> (a) Definitions
>
> In this section the following definitions shall apply:
>
> * * *
>
> (6) Whistleblower
>
> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.
>
> * * *
>
> (h) Protection of whistleblowers
>
> (1) Prohibition against retaliation
>
> (A) In general
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

STATEMENT

This case presents a simple question of statutory interpretation. Section 922(a) of the Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). A "whistleblower," in turn, is protected from retaliation if, *inter alia*, he "mak[es] disclosures that are required or protected" under the Sarbanes-Oxley Act of 2002; the Securities Exchange Act of 1934; Section 1513(e) of Title 18; or any other law subject to the jurisdiction of the Securities and Exchange Commission (SEC). 15 U.S.C. 78u-6(h)(1)(A). The question presented is whether that anti-retaliation provision, applicable to "whistleblowers," extends to an individual who has not reported a violation of the securities laws to the SEC and thus falls outside the statutory definition of a "whistleblower."

Petitioner is a publicly traded real-estate investment trust that owns, acquires, and develops data centers. Respondent was petitioner's employee until he was terminated. As is relevant here, respondent sued under the Dodd-Frank Act's anti-retaliation provision, alleging that he was fired for making internal complaints protected by the Sarbanes-Oxley Act. Because respondent did not report a securities-law violation to the SEC, petitioner moved to dismiss respondent's claim on the ground

that he was not a "whistleblower" within the meaning of the statutory definition.

The district court denied the motion to dismiss, and a divided panel of the Ninth Circuit affirmed. Over a dissent from Judge Owens, the Ninth Circuit held that the anti-retaliation provision applies to any individual who makes an internal report of alleged misconduct, regardless of whether the individual reports a securities-law violation to the SEC and thus qualifies as a "whistleblower" under the statutory definition. That holding is flatly inconsistent with the plain text of the Dodd-Frank Act, as well as its structure and history. The Ninth Circuit's judgment should therefore be reversed.

A. Background

1. Congress enacted the Dodd-Frank Act in 2010, in the aftermath of the recent financial crisis. Congress's goal was to create a "new framework to prevent a recurrence or mitigate the impact of financial crises that could cripple financial markets and damage the economy." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). Congress recognized that "[s]ignificant aspects of the financial crisis involved securities" and that "investors needed better protection." *Id.* at 36. That, in turn, required more robust enforcement efforts by the SEC. See *ibid.*

Congress included Section 922(a), a provision entitled "Securities whistleblower incentives and protection." 124 Stat. 1841 (codified at 15 U.S.C. 78u-6 and as Section 21F of the Securities Exchange Act of 1934). That section has three primary components: a provision defining "whistleblower" and other terms; a provision establishing a reward program for "whistleblowers"; and the anti-retaliation provision, which protects "whistleblowers" from retaliation.

At the outset, the definitional provision specifies that "the following definitions shall apply" "[i]n this section": *i.e.*, throughout what is now codified as 15 U.S.C. 78u-6. 15 U.S.C. 78u-6(a). It proceeds to define a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6).

Incorporating that definition, Congress then created a reward program for "whistleblowers who voluntarily provide[] original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). A whistleblower who qualifies for a reward under that program is guaranteed between 10% and 30% of "what has been collected of the monetary sanctions imposed in the action or related actions," *ibid.*, unless there are grounds to deny the award (for example, if the whistleblower is implicated in the prosecuted misconduct), 15 U.S.C. 78u-6(c)(2).

Finally, and of particular relevance here, Congress included an anti-retaliation provision that guarantees "[p]rotection of whistleblowers." 15 U.S.C. 78u-6(h)(1)(A). That provision states that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. *Ibid.*

The first clause of the anti-retaliation provision states that a whistleblower is protected from retaliation because of any lawful act done in "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i). The second clause states that a

whistleblower is protected from retaliation because of any act done in "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(ii). And the third clause states that a whistleblower is protected from retaliation because of any act done in "making disclosures that are required or protected" under (1) the Sarbanes-Oxley Act of 2002; (2) "this chapter" (*i.e.*, the Securities Exchange Act of 1934); (3) Section 1513(e) of Title 18, a federal criminal statute prohibiting retaliation against witnesses; or (4) "any other law, rule, or regulation subject to the jurisdiction of the Commission" (for example, the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940). 15 U.S.C. 78u-6(h)(1)(A)(iii).

2. Shortly after the enactment of the Dodd-Frank Act, the SEC initiated notice-and-comment rulemaking concerning the whistleblower provisions in Section 78u-6. Consistent with the plain text of the definitional provision of the statute, the SEC's proposed rule defined a "whistleblower" as an individual who "provides information *to the Commission* that relates to a potential violation of the securities laws." 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added).

In its final rule, however, the SEC unexpectedly reversed course. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011). There, the SEC set forth two different definitions of the statutory term "whistleblower." Like the proposed rule, the final rule first stated: "You are a whistleblower if * * * you provide the Commission with information pursuant to the procedures set forth in [this rule] and the information relates to a possible violation of the Federal securities laws * * * that has occurred, is ongoing, or is about to occur." 17 C.F.R.

240.21F-2(a)(1). But unlike the proposed rule, the final rule created a different definition of "whistleblower" "[f]or purposes of the anti-retaliation [provision]." 17 C.F.R. 240.21F-2(b)(1). According to that definition, an individual qualifies as a "whistleblower" under the anti-retaliation provision if the individual provides "information in a manner described in [the anti-retaliation provision]," regardless of whether the individual reported a securities-law violation *to the SEC*. 17 C.F.R. 240.21F-2(b)(1)(ii). In other words, the SEC defined "whistleblower" for purposes of the anti-retaliation provision primarily by reference not to the statutory definition of "whistleblower," but rather to the substantive activity protected by that provision.

In its proposed rule, the SEC did not suggest that it was considering expanding the definition of "whistleblower" beyond the statutory definition to include individuals who have not reported securities-law violations to the SEC, nor did it specifically request comment on such an expansion. Not surprisingly, therefore, in the final rule, the SEC did not cite any of the more than 240 comments it received to explain its deviation from the proposed rule; in fact, it provided no explanation whatsoever for the deviation. See 76 Fed. Reg. 34,301-34,304.

3. The Sarbanes-Oxley Act of 2002, enacted eight years before the Dodd-Frank Act, also contains an anti-retaliation provision protecting individuals who report fraudulent activity. That provision applies in two scenarios. *First*, it prohibits retaliation against an "employee" because of any act done in "provid[ing] information, caus[ing] information to be provided, or otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud

against shareholders." 18 U.S.C. 1514A(a)(1). Under that provision, an employee qualifies for protection if he reports the alleged misconduct not just to the SEC, but to an internal supervisor, any other federal agency, or Congress. *Ibid.* *Second*, the provision prohibits retaliation against an "employee" because of any act done in "fil[ing], caus[ing] to be filed, testify[ing], participat[ing] in, or otherwise assist[ing] in a proceeding filed or about to be filed * * * relating to an alleged violation" of the same provisions of federal law. 18 U.S.C. 1514A(a)(2).

4. The anti-retaliation regimes in the Dodd-Frank Act and the Sarbanes-Oxley Act differ in a number of important respects. Most notably, the Dodd-Frank Act's anti-retaliation provision applies by its terms only to individuals who qualify as "whistleblowers," see 15 U.S.C. 78u-6(h)(1)(A), whereas the Sarbanes-Oxley Act's provision applies to all "employees," see 18 U.S.C. 1514A(a).

In addition, under the Dodd-Frank Act, a whistleblower may bring suit directly in federal court. See 15 U.S.C. 78u-6(h)(1)(B)(i). Under the Sarbanes-Oxley Act, however, an employee must first exhaust administrative remedies by filing a complaint with the Secretary of Labor; the employee may bring suit in federal court only if the Secretary does not issue a final decision within 180 days of filing. See 18 U.S.C. 1514A(b)(1).

The limitations period for an anti-retaliation claim under the Dodd-Frank Act is at least six years, see 15 U.S.C. 78u-6(h)(1)(B)(iii),[1] but the corresponding period

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[1] A cause of action under the Dodd-Frank Act's anti-retaliation provision may not be brought "more than 6 years after the date on which the violation * * * occurred," except that it may be brought within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the em-

under the Sarbanes-Oxley Act is only six months, see 18 U.S.C. 1514A(b)(2)(D). And under the Dodd-Frank Act, a whistleblower may seek double backpay, see 15 U.S.C. 78u-6(h)(1)(C)(ii), but that remedy is not available under the Sarbanes-Oxley Act, see 18 U.S.C. 1514A(c)(2)(B).

B. Facts And Procedural History

1. Petitioner is a real-estate investment trust that owns, acquires, and develops data centers. Petitioner hired respondent as a vice president of portfolio management in 2010, and it fired him in April 2014. Pet. App. 14a-15a.

In November 2014, respondent filed suit against petitioner and Ellen Jacobs, a senior vice president for human resources, in the United States District Court for the Northern District of California.[2] Respondent alleged that, shortly before being fired, he had complained to senior management that his supervisor had eliminated some internal controls over certain corporate actions, allegedly in violation of the Sarbanes-Oxley Act. It is undisputed that respondent did not report any violation of the securities laws to the SEC. He nevertheless asserted in his complaint that petitioner had retaliated against him in violation of the Dodd-Frank Act's anti-retaliation provision by firing him for, *inter alia*, internally reporting the alleged misconduct. Petitioner also asserted a variety of other claims under federal and state law. Pet. App. 3a, 14a-15a.

2. Petitioner moved to dismiss the Dodd-Frank Act claim. Petitioner argued that respondent was not a

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ployee" (but in no event "more than 10 years after the date on which the violation occur[red]"). 15 U.S.C. 78u-6(h)(1)(B)(iii)(I), (II).

[2] Ms. Jacobs was not named as a defendant on the Dodd-Frank Act claim.

"whistleblower" within the meaning of the anti-retaliation provision because he did not report a securities-law violation to the SEC. As a result, the anti-retaliation provision did not apply. Pet. App. 13a.

The district court denied the motion. Pet. App. 12a-47a. At the outset, the court acknowledged that the Dodd-Frank Act "defines a 'whistleblower' as 'any individual who provides * * * information relating to a violation of the securities laws *to the Commission*.'" *Id.* at 18a-19a (ellipsis in original) (quoting 15 U.S.C. 78u-6(a)(6)). It also recognized that the only court of appeals to have considered the question had held that an individual must report a securities-law violation to the SEC in order to qualify as a "whistleblower" within the meaning of the anti-retaliation provision. *Id.* at 25a n.4 (citing *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)).

The district court nevertheless concluded that the language in the statutory definition was ambiguous in light of the third clause of the anti-retaliation provision, which "prohibit[s] retaliatory acts against employees who make" internal as well as external disclosures. Pet. App. 26a. Because the court could not "find a clear and simple way to read the statutory provisions * * * in perfect harmony with one another," it deferred to the SEC's interpretation, under which an individual who makes only an internal disclosure is a "whistleblower" for purposes of the anti-retaliation provision of the Dodd-Frank Act. *Id.* at 40a-43a. Recognizing a "serious split of authority" on the issue, the district court certified its order for interlocutory review. *Id.* at 46a-47a; D. Ct. Dkt. 61, at 4 (July 22, 2015).

3. The court of appeals granted interlocutory review. After review was granted, but before the case was decided, a divided panel of the Second Circuit issued an

opinion disagreeing with the Fifth Circuit and holding that an individual who makes only an internal disclosure is a "whistleblower" for purposes of the Dodd-Frank Act's anti-retaliation provision. See *Berman* v. *Neo @Ogilvy LLC*, 801 F.3d 145 (2015). Judge Jacobs dissented in that case, concluding that the Fifth Circuit had correctly decided the question in *Asadi*. See *id.* at 155-160.

4. On interlocutory review, a divided panel of the court of appeals affirmed. Pet. App. 1a-11a.

a. The court of appeals acknowledged at the outset that Section 78u-6(a)(6) defines a "whistleblower," for purposes of the entire section, as an individual who "provides * * * information relating to a violation of the securities laws to the Commission." Pet. App. 5a. But the court reasoned that the definition of "whistleblower" "should not be dispositive of the scope of [the] anti-retaliation provision," because "[t]erms can have different operative consequences in different contexts." *Id.* at 7a (citing *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). According to the court, "[s]tatutory definitions are * * * just one indication of meaning," and the anti-retaliation provision "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at 7a-8a (internal quotation marks, brackets, and citation omitted).

A contrary interpretation, the court of appeals continued, would "make little practical sense and undercut congressional intent." Pet. App. 8a. In the court's view, applying the statutory definition of "whistleblower" would "narrow[] [the third clause of the anti-retaliation provision] to the point of absurdity." *Ibid.* The court noted that individuals who made both internal disclosures and reports to the SEC would still be covered, but it surmised that "[e]mployees are not likely to report in

both ways." *Ibid.* The court believed that a broader interpretation was necessary to "give effect to all statutory language." *Ibid.*

For that reason, the court of appeals concluded that the anti-retaliation provision "should be read to provide protections to those who report internally as well as to those who report to the SEC." Pet. App. 10a. The court added that, "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term," the SEC's interpretation was entitled to deference. *Ibid.* The court reasoned that the SEC's interpretation "accurately reflects Congress's intent to provide broad whistleblower protections under [the Dodd-Frank Act]." *Ibid.*

b. Judge Owens dissented. Pet. App. 11a. He indicated that he would have held that the anti-retaliation provision reaches only individuals who fall within the Act's definition of "whistleblower," based on the reasoning of the Fifth Circuit in *Asadi* and Judge Jacobs' dissent in *Berman*. *Ibid.* He added that, to the extent the majority relied on this Court's decision in *King*, *supra*, "we should quarantine *King* * * * to the specific facts of that case." *Ibid.*

SUMMARY OF ARGUMENT

This case turns on a principle of statutory interpretation so self-evident that it hardly needs stating: where a statute includes an express definition of a term, courts and agencies may not invent a different definition. In adopting a definition of "whistleblower" that is more expansive than the one Congress actually provided in the Dodd-Frank Act, the Ninth Circuit and the SEC violated that unimpeachable principle. The Ninth Circuit's broader definition is profoundly atextual; it cannot be

reconciled with the statute's structure and history; and it threatens to render the separate anti-retaliation regime of the Sarbanes-Oxley Act effectively obsolete. The Ninth Circuit's interpretation of the Dodd-Frank Act is simply untenable, and its judgment should therefore be reversed.

A. In Section 922(a) of the Dodd-Frank Act, Congress defined the statutory term "whistleblower" and instructed courts to apply that definition "[i]n this section"—a section that includes the Act's anti-retaliation provision. The statutory definition of "whistleblower" delineates the *category of individuals* entitled to protection under the anti-retaliation provision: namely, individuals who "provide[] * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." The anti-retaliation provision, in turn, describes the *conduct* that gives rise to a cause of action for retaliation. Under the anti-retaliation provision, even if a person has been the victim of retaliatory conduct, he must still be within the category of individuals covered by that provision—a "whistleblower," as the term is defined in the statute—in order to have a cause of action.

That conclusion inexorably flows from the statute's text and is wholly consistent with the statute's structure and history. Section 922(a) of the Dodd-Frank Act was intended to encourage individuals to report securities-law violations to the SEC. It accomplishes that goal through two substantive provisions that work in tandem. The first creates financial incentives for individuals to report securities-law violations to the SEC; the second, at issue here, protects individuals who report to the SEC against retaliation. In the legislative history, Congress confirmed that its intent was to create a "new, robust whistleblower program designed to motivate people who

know of securities law violations to tell the SEC." In fact, Congress rejected a version of the anti-retaliation provision that would have applied broadly to all employees, instead limiting the reach of that provision (and the rest of Section 922(a)) to "whistleblowers"—a defined term covering only those who report to the SEC.

The foregoing interpretation also preserves the balance between the anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act. The Sarbanes-Oxley Act protects "employees" from retaliation when they report violations of certain federal laws to a supervisor, a federal agency, or Congress. In enacting that provision, Congress declined to create a private right of action for such employees, instead requiring them to pursue an administrative remedy with the Secretary of Labor. The Ninth Circuit's interpretation of the Dodd-Frank Act's anti-retaliation provision substantially diminishes the role of the Sarbanes-Oxley Act's regime, because it authorizes *any* employee who made a protected disclosure to proceed directly in federal court under the Dodd-Frank Act, regardless of whether the employee reported a securities-law violation to the SEC. There is no indication in the text or history of the Dodd-Frank Act that Congress intended to effect such a sweeping change in the existing regime.

B. The Ninth Circuit justified its decision to disregard the statutory definition of "whistleblower" on the ground that applying that definition would give an absurdly narrow meaning to the third clause of the Dodd-Frank Act's anti-retaliation provision. That is incorrect. The third clause protects individuals who make disclosures both to the SEC and to a supervisor, another federal agency, or Congress, but who are disciplined because of the latter disclosure. The Ninth Circuit also expressed concern that lawyers and outside auditors would

not qualify for protection under the plain-text interpretation because they would typically be required to report internally before reporting to the SEC. But there is no reason to think that Congress specifically intended to protect those two groups in the third clause. Congress acts within its authority when it enacts legislation that protects some groups of persons but not others. The Ninth Circuit's halfhearted resort to the absurdity canon does not save its atextual interpretation of the statute.

C. The SEC's interpretation in its final rule—which creates a separate and more expansive definition of "whistleblower" for purposes of the anti-retaliation provision—is not entitled to any deference. Courts do not defer to an agency interpretation when the underlying statute is unambiguous, and there is no ambiguity in the Dodd-Frank Act's whistleblower provisions.

Even if there were some ambiguity, moreover, the SEC's interpretation would still not be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the SEC's rule was procedurally defective. The SEC promulgated an interpretation in its final rule that was the diametric opposite of the interpretation in its proposed rule, without providing any notice that it was considering such a change. Compounding that defect, the SEC failed to provide any explanation for its novel interpretation. And the SEC's interpretation lacks the power to persuade and should therefore be rejected altogether.

While aspects of the statutory regime at issue may be complex, this case is easy. Because respondent concededly did not report a violation of the securities laws to the SEC, he is not entitled to sue under the Dodd-Frank Act's anti-retaliation provision. The judgment of the Ninth Circuit should therefore be reversed.

ARGUMENT

IN ORDER TO QUALIFY AS A 'WHISTLEBLOWER' FOR PURPOSES OF THE ANTI-RETALIATION PROVISION OF THE DODD-FRANK ACT, AN INDIVIDUAL MUST REPORT A VIOLATION OF THE SECURITIES LAWS TO THE SEC

A. The Dodd-Frank Act Unambiguously Requires Reporting A Securities-Law Violation To The SEC

1. The Statutory Definition Of 'Whistleblower' Plainly Applies To The Anti-Retaliation Provision

As in all statutory-interpretation cases, the Court's analysis should begin with the text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). And because the text here is clear, "that is also where the inquiry should end." *Puerto Rico* v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted).

a. The Dodd-Frank Act's anti-retaliation provision states that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. 15 U.S.C. 78u-6(h)(1)(A). The anti-retaliation provision identifies who is protected—a "whistleblower." *Ibid.* And it specifies what the whistleblower is protected from—retaliation on account of (i) "providing information to the Commission in accordance with this section"; (ii) "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission"; or (iii) "making disclosures that are required or protected" under certain federal laws. *Ibid.*

The Dodd-Frank Act, moreover, supplies a definition of "whistleblower": "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). That definition unambiguously requires the reporting of a violation of the securities laws to the SEC.

Where "a statute includes an explicit definition," the Court "must follow that definition, even if it varies from th[e] term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). That is because a statutory definition is Congress's "own glossary," and "[t]here would be little use in such a glossary if [the Court] were free in despite of it to choose a meaning for [itself]." *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935); see *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960). For that reason, "[i]t is axiomatic that the statutory definition of [a] term excludes unstated meanings." *Meese* v. *Keene*, 481 U.S. 465, 484 (1987); see *Colautti* v. *Franklin*, 439 U.S. 379, 392-393 n.10 (1979); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:7, at 306-312 & nn. 2-3, 9 (7th ed. 2014).

Nor is there any ambiguity that the statutory definition of "whistleblower" applies to the anti-retaliation provision. The definitional subsection itself commands that "[i]n this section" (*i.e.*, Section 78u-6, which includes the anti-retaliation provision) "the following definitions *shall* apply." 15 U.S.C. 78u-6(a) (emphasis added). The statutory term "shall" "normally creates an obligation impervious to judicial discretion." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34-35

(1998); see *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016).

The resulting syllogism is straightforward. Section 78u-6(h)(1)(A) prohibits retaliation against a particular category of persons: namely, a "whistleblower." In Section 78u-6 (including subsection (h)(1)(A)), that term "means any individual who provides * * * information relating to a violation of the securities laws to the Commission." 15 U.S.C. 78u-6(a)(6). Individuals who do not satisfy those criteria are not "whistleblower[s]," *ibid.*, and thus do not qualify for protection under the anti-retaliation provision in Section 78u-6(h)(1)(A). See *Carhart*, 530 U.S. at 942; *Fox*, 294 U.S. at 95-96.

b. In *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), this Court construed statutory provisions with a similar configuration in a similar manner. There, the Court considered whether a debtor's attorney in a Chapter 7 bankruptcy proceeding could recover his fees under Section 330 of the Bankruptcy Code. That section allowed "a trustee, an examiner, [or] a professional person employed under section 327 or 1103" to recover, *inter alia*, "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." *Id.* at 530 (quoting 11 U.S.C. 330(a)(1)).

In *Lamie*, the petitioner, a bankruptcy lawyer, began providing legal services to a client in a Chapter 11 bankruptcy proceeding. See 540 U.S. at 531-532. Shortly after that proceeding began, the bankruptcy court converted the proceeding into a Chapter 7 proceeding. See *id.* at 532. The conversion ended the lawyer's "service under § 327 as an attorney for the debtor-in-possession." *Ibid.* After the conversion, however, the lawyer continued providing legal services to the debtor without the

trustee's authorization. See *ibid.* The lawyer then sought fees under Section 330 for the time he spent working on the debtor's behalf after the conversion. See *ibid.*

The lower courts uniformly held that the lawyer was not entitled to fees under Section 330, and this Court agreed. The Court began by observing that, although "[t]he statute is awkward, and even ungrammatical," "that does not make it ambiguous on the point at issue." 540 U.S. at 534. "In its first part," the Court explained, "the statute authorizes an award of compensation to one of three types of persons: trustees, examiners, and § 327 professional persons." *Ibid.* "A debtor's attorney not engaged as provided by § 327," the Court continued, "is simply not included within the class of persons eligible for compensation." *Ibid.* As a result, the subsequent language in the provision defining "what type of compensation may be awarded" did not come into play: "[u]nless the applicant for compensation is in one of the named classes of persons in the first part, the kind of service rendered is irrelevant." *Ibid.*

A similar analysis applies here. "In its first part," the anti-retaliation provision protects one "type[] of person[]": a "whistleblower." *Lamie*, 540 U.S. at 534. An individual who does not qualify as a "whistleblower" within the meaning of the statute "is simply not included within the class of persons eligible" for anti-retaliation protection. *Ibid.* And as in *Lamie*, whether an individual has engaged in (or been subjected to) the type of *conduct* described by the anti-retaliation provision is "irrelevant" if the individual is not within the *category of individuals* covered by the provision in the first place. See *ibid.*

2. *The Anti-Retaliation Provision's Place In The Broader Statutory Scheme Confirms The Plain-Text Interpretation*

The foregoing interpretation accords with the anti-retaliation provision's "place in the statutory scheme and, in particular, its relationship to the other protections that the Act affords." *Jones* v. *Harris Associates L.P.*, 559 U.S. 335, 348 (2010); see, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

a. As its title—"Securities whistleblower incentives and protection"—suggests, Section 922(a) of the Dodd-Frank Act contains two types of substantive provisions applicable to "whistleblowers." It first provides financial "incentives" for whistleblowers to report securities-law violations to the SEC. Those incentives are tied to the SEC's receipt of information about, and pursuit of enforcement actions for, such violations: in order to qualify for an award, a whistleblower must "voluntarily provide[] original information to the Commission," and that information must lead to the "successful enforcement" of an action "brought by the Commission under the securities laws." 15 U.S.C. 78u-6(a)(1), (b)(1).

A whistleblower who satisfies those criteria is entitled to an award of 10% to 30% of "what has been collected of the monetary sanctions imposed in the action or related actions." 15 U.S.C. 78u-6(b)(1). In determining the amount of the award, the SEC considers a number of factors: specifically, "the significance of the information provided by the whistleblower to the success" of the covered action; "the degree of assistance" provided by the whistleblower; and "the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide infor-

mation that lead[s] to the successful enforcement of such laws." 15 U.S.C. 78u-6(c)(1)(B)(i).

The award provision thus focuses on the connection between a whistleblower's information and the SEC's enforcement efforts. It incents whistleblowers to report information about securities-law violations. And it makes that incentive stronger as the information and assistance the SEC receives become more significant.

b. Section 922(a) of the Dodd-Frank Act also provides "protection" for whistleblowers who report securities-law violations to the SEC. The anti-retaliation provision reinforces the award provision's monetary incentives. It prohibits retaliation in specific circumstances set out in three separate clauses, the first two of which work hand in glove with the award provision. *First*, under the award provision, a whistleblower is entitled to receive an award if he "voluntarily provided original information to the Commission," 15 U.S.C. 78u-6(b)(1), "in such form as the Commission may, by rule, require," 15 U.S.C. 78u-6(c)(2)(D). Similarly, under the first clause of the anti-retaliation provision, an employer may not retaliate against a whistleblower for "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i).

Second, under the award provision, "the degree of assistance" a whistleblower provides is a factor in determining the amount of the award the whistleblower receives. 15 U.S.C. 78u-6(c)(1)(B)(i). Under the second clause of the anti-retaliation provision, an employer may not retaliate against a whistleblower for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission" based on information the whistleblower provided. 15 U.S.C. 78u-6(h)(1)(A)(ii). The award and anti-retaliation provisions thus work together to motivate individuals both to pro-

vide information to the SEC and to assist the SEC in using that information in any subsequent enforcement action.

While less explicitly tied to the award provision, the third clause of the anti-retaliation provision serves a similar purpose. An individual may well report alleged misconduct both to the SEC and to another entity, such as the individual's employer, another federal agency, or Congress. The award provision indisputably applies to such an individual. But if an employer retaliates against such an individual "because of" the latter, non-SEC disclosure, the individual would not qualify for anti-retaliation protection under either of the first two clauses. See *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-628 (5th Cir. 2013). The third clause fills that gap.

Under the third clause, an employer may not retaliate against a whistleblower for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 * * *, this chapter, * * * [,] section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii). By virtue of that clause, a whistleblower who reports alleged misconduct both to the SEC and to another entity has the same protection from retaliation—and thus the same incentive to report to the SEC—as a whistleblower who does not make the additional disclosure.

In short, the Dodd-Frank Act's whistleblower provisions work in tandem to create a coherent statutory scheme. That scheme gives individuals an incentive to report securities-law violations to the SEC and to cooperate in subsequent SEC enforcement actions. And it reinforces those incentives by providing those individuals with broad protection against retaliation. Extending

anti-retaliation protection to individuals who have not reported securities-law violations to the SEC would divorce the anti-retaliation provision from the rest of the section.

c. Another provision of the Dodd-Frank Act similarly supports the plain-text interpretation of the anti-retaliation provision. Title 10 of the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB), also contains an anti-retaliation provision. That provision, Section 1057, prohibits retaliation against a "covered employee" who provides "information to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency" about a violation of laws within the CFPB's jurisdiction. 12 U.S.C. 5567(a)(1).

"[W]hen Congress includes particular language in one section of a statute but omits it in another," this Court "presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks, alteration, and citation omitted); see, *e.g.*, *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). That principle applies with full force in this case. Unlike the anti-retaliation provision at issue here, the CFPB's anti-retaliation provision protects any "covered employee." 12 U.S.C. 5567(a)(1). That phrase is defined to reach "any individual performing tasks related to the offering or provision of a consumer financial product or service," without any additional requirement that the individual report alleged misconduct to the CFPB (or any other entity). 12 U.S.C. 5567(b). Here, by contrast, the category of covered individuals—"whistleblowers"—is subject to precisely such a requirement. As the CFPB's anti-retaliation provision confirms, Congress plainly knew how to draft an anti-retaliation provision that covered a

broader category of individuals, but it conspicuously did not do so in the provision at issue here.

3. The Legislative History of the Dodd-Frank Act Also Supports The Plain-Text Interpretation

The legislative history of the Dodd-Frank Act confirms the plain-text interpretation of the anti-retaliation provision. In Section 922(a) of the Act, Congress set out to create a "new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 176, *supra*, at 38. The idea was to enlist whistleblowers to "assist the [g]overnment to identify and prosecute persons who have violated securities laws" and thereby "recover money for victims of financial fraud." *Id.* at 110. In other words, Section 922(a) was designed to channel information about a certain kind of misconduct (securities-law violations) to a certain place (the agency that enforces the federal securities laws).

Congress intended for the Dodd-Frank Act's whistleblower provisions to work together to achieve that goal. Congress knew that monetary awards would provide a powerful incentive to report misconduct to the SEC. See S. Rep. No. 176, *supra*, at 111. But it also understood that whistleblowers who are employees run a serious risk when they expose their employers' misconduct in that manner. As the Senate Banking Committee observed, such whistleblowers "often face the difficult choice between telling the truth and the risk of committing 'career suicide.'" *Ibid.*

To mitigate that risk, Congress established a "robust" regime that pairs "ampl[e] reward[s]" with a cause of action that imposes substantial penalties for retaliation. S. Rep. No. 176, *supra*, at 38, 111. Specifically, that cause of action allows a plaintiff to proceed directly in

federal court without exhausting administrative remedies, see 15 U.S.C. 78u-6(h)(1)(B)(i), and to seek double backpay, see 15 U.S.C. 78u-6(h)(1)(C)(ii), and it sets a generous limitations period of at least six years, see 15 U.S.C. 78u-6(h)(1)(B)(iii); p. 8 n.1, *supra*. Congress thus intended for whistleblowing employees—who face heightened risks when they report their employers' misconduct to the SEC—to have heightened protection against retaliation under the Dodd-Frank Act.

The history of the anti-retaliation provision supports that conclusion. When it originated in the House of Representatives, the anti-retaliation provision initially read: "No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee, contractor, or agent in the terms and conditions of employment because of any lawful act done by the employee, contractor, or agent" in providing information to the SEC or in assisting in any SEC investigation or action based on the information. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(a) (2009). While the bill defined a "whistleblower" as an individual who submitted information to the SEC, see *ibid.*, the anti-retaliation provision did not use the defined term "whistleblower," instead applying to "an employee, contractor, or agent."

But Congress ultimately rejected that version of the anti-retaliation provision. In its later version of the bill, the Senate replaced the phrase "employee, contractor, or agent" with the defined term "whistleblower." See Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 922 (2010). That defined term carried through to the enacted version of the provision. See 15 U.S.C. 78u-6(h)(1)(A).

"Few principles of statutory construction are more compelling than the proposition that Congress does not

intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987); see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). That principle applies with full force here. The House initially proposed an anti-retaliation provision that would apply to all employees. But the Senate narrowed the provision to cover only "whistle-blowers," and Congress enacted the narrower version. This Court should reject an interpretation of the anti-retaliation provision that would effectively restore the discarded statutory language.

4. The Plain-Text Interpretation Best Preserves The Sarbanes-Oxley Act's Anti-Retaliation Regime

Finally, the plain-text interpretation of the anti-retaliation provision best reconciles that provision with its counterpart in the Sarbanes-Oxley Act.

As this Court recently recognized, the anti-retaliation provisions in the Sarbanes-Oxley Act and the Dodd-Frank Act serve different purposes. The Sarbanes-Oxley Act's provision protects "employees who provide information to any person with supervisory authority over the employee," whereas the Dodd-Frank Act's provision "focuses primarily on reporting to federal authorities." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014) (internal quotation marks and citation omitted). Those different purposes reflect the distinct contexts in which the two statutes were enacted: adopted in the wake of the Enron scandal, the Sarbanes-Oxley Act aimed to "prevent and punish corporate and criminal fraud," *id.* at 1162 (quoting S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002)), whereas the Dodd-Frank Act was specifically

intended to enable the SEC to engage in more robust enforcement, see pp. 4, 24-25, *supra*.

Accordingly, the Sarbanes-Oxley Act's anti-retaliation provision is different in scope from the Dodd-Frank Act's. The former provision offers broad protection to employees of publicly traded companies who expose fraudulent activity. See *Lawson*, 134 S. Ct. at 1162-1163. As discussed above, the provision covers "employees" who report violations of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders"—regardless of whether the employee makes his report to the SEC, an internal supervisor, any other federal agency, or Congress. 18 U.S.C. 1514A(a)(1); see pp. 7-8.

At the same time, the Sarbanes-Oxley Act's anti-retaliation provision has important limitations. Most importantly, in order to invoke the provision, an employee must first file an administrative complaint with the Secretary of Labor, see 18 U.S.C. 1514A(b)(1)(A), and must do so within six months of the alleged retaliation, see 18 U.S.C. 1514A(b)(2)(D). Only if the Secretary of Labor does not issue a final decision within 180 days may the employee bring suit in federal court. See 18 U.S.C. 1514A(b)(1)(B). A successful plaintiff, moreover, is limited to the "relief necessary to make the employee whole"—*i.e.*, reinstatement, backpay, and special damages. 18 U.S.C. 1514(c)(1)-(2).

Those limitations are not accidental. Quite to the contrary, much as it did with the Dodd-Frank Act, Congress specifically rejected proposals that did not suit its statutory design. For example, Congress considered whether to give employees the option of proceeding directly in federal court, and ultimately decided not to do so. Compare Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 7(a) (as intro-

duced in Senate, Mar. 12, 2002) (allowing an employee to choose between filing a complaint with the Secretary of Labor and bringing suit in federal court), with 18 U.S.C. 1514A(b)(1)(A) (requiring an employee to file a complaint first with the Secretary of Labor). And Congress considered whether to provide double backpay to successful plaintiffs, and ultimately decided not to do so either. Compare Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 7(a) (as introduced in Senate, Mar. 12, 2002) (providing for double backpay), with 18 U.S.C. 1514A(c)(2)(B) (providing only for backpay). In rejecting those proposals and compromising on an amended version, some members of the Senate Judiciary Committee expressed concern that a "private cause of action" and "excessive damages" might lead to "frivolous claims that abuse the protections [Congress sought] to bestow." S. Rep. No. 146, *supra*, at 26.

When Congress enacted the Dodd-Frank Act eight years later, it sought in the whistleblower provisions to create additional incentives for individuals to report securities-law violations to the SEC. Accordingly, the Dodd-Frank Act's anti-retaliation provision lacks many of the limitations from its counterpart in the Sarbanes-Oxley Act. As discussed above, the Dodd-Frank Act allows a whistleblower to proceed directly in federal court without exhausting administrative remedies and to seek double backpay, and it sets a generous limitations period of at least six years. See pp. 24-25, *supra*.

In short, the two anti-retaliation provisions are not coextensive. The Ninth Circuit's interpretation of the Dodd-Frank Act's provision would upset the balance between the two provisions, giving plaintiffs procedural advantages and remedies that Congress deliberately rejected in the Sarbanes-Oxley Act and thus threatening to

render the Sarbanes-Oxley Act's provision effectively obsolete.

This case, in fact, appears to be a prime example of that danger. Respondent attempted to do under the Dodd-Frank Act what Congress declined to allow under the Sarbanes-Oxley Act: namely, to proceed directly in federal court, seeking double backpay, based on an allegation that his employer retaliated against him for internally reporting alleged violations of the Sarbanes-Oxley Act itself. But respondent did not seek to file an administrative complaint with the Secretary of Labor under the Sarbanes-Oxley Act's anti-retaliation provision, though he seemingly takes the position he was entitled to do so. See Compl. ¶¶ 47, 54, at 8-9, 9-10 (Nov. 24, 2014). Nor is respondent alone in that approach: out of the more than thirty cases involving the question presented, it appears that only four plaintiffs chose to file administrative complaints with the Secretary of Labor.[3] Under the Ninth Circuit's interpretation, plaintiffs would have little incentive to pursue relief under the Sarbanes-Oxley Act's anti-retaliation provision.

At a minimum, then, the Ninth Circuit's interpretation would substantially reduce the role of the Sarbanes-Oxley Act's provision. But there is no indication in the text or legislative history of the Dodd-Frank Act that Congress intended to work such a substantial change in the existing regime. As this Court famously put it,

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[3] See *Wadler* v. *Bio-Rad Laboratories, Inc.*, 141 F. Supp. 3d 1005, 1010-1011 (N.D. Cal. 2015); *Duke* v. *Prestige Cruises International, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015); *Peters* v. *LifeLock Inc.*, Civ. No. 14-576, 2014 WL 12544495, at *3-*7 (D. Ariz. Sept. 19, 2014); *Genberg* v. *Porter*, 935 F. Supp. 2d 1094, 1099 (D. Colo. 2013), aff'd in part on other grounds and dismissed in part, 566 Fed. Appx. 719 (10th Cir. 2014).

"Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).

So too here. An interpretation of the Dodd-Frank Act's anti-retaliation provision that requires reporting to the SEC avoids disruption of the Sarbanes-Oxley Act's preexisting regime. And it is the only interpretation consistent with the text, structure, and history of the Dodd-Frank Act itself. This Court should adopt that interpretation.

B. An Interpretation That Requires Reporting To The SEC Does Not Produce Absurd Results

In the decision under review, the Ninth Circuit refused to apply the Dodd-Frank Act's statutory definition of "whistleblower" to the anti-retaliation provision on the ground that doing so would "narrow[] [the third clause of the provision] to the point of absurdity." Pet. App. 8a. That concern is unfounded. It was perfectly reasonable for Congress to establish reporting a securities-law violation to the SEC as a prerequisite for invoking the Dodd-Frank Act's anti-retaliation provision. The Ninth Circuit's interpretation should therefore be rejected.

1. It is a familiar principle of statutory interpretation that, "when a statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms," unless "the disposition required by the text [would be] absurd." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1896 (2013) (alteration and citation omitted). Consistent with that principle, this Court does not "rescue Congress from its drafting errors" or "provide for what [the Court] might think * * * is the preferred result." *Lamie*, 540 U.S. at 542 (ellipsis in original; citation omitted). Even

when it is "entirely certain that [ignoring the plain text] would more effectively achieve the purposes" of the statute, the Court's task is to "apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

The Court should be especially loath to depart from the statutory text here, because it would then have to give the term "whistleblower" different meanings in two different parts of the same statutory section—*i.e.*, the statutory definition (requiring reporting to the SEC) in the award provision, but a more expansive definition (dispensing with that requirement) in the anti-retaliation provision. The Court has repeatedly expressed reluctance about "giv[ing] the [same] word * * * different meanings within the same statutory section" where "the words of the statute are not ambiguous." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980); see, *e.g.*, *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007); *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994).

The Ninth Circuit and other lower courts have identified three purported absurdities in refusing to apply the statutory definition of "whistleblower" to the anti-retaliation provision. Each is illusory.

a. To begin with, lower courts have contended that applying the "whistleblower" definition to the anti-retaliation provision would leave the third clause with little work to do. See Pet. App. 8a; *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 151-152 (2d Cir. 2015). But courts may not disregard unambiguous statutory language simply because that language may produce only "modest" "effect[s]." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). Notably, the lower courts that have advanced this contention have stopped short of suggesting that applying the "whistleblower" definition would render the third clause superfluous; as discussed

below, it plainly would not. That should end the analysis. As long as the plain-text interpretation gives the third clause some rational effect, courts cannot invoke the absurdity doctrine to rewrite the statute in order to achieve its supposed purpose "more effectively." *Pavelic & LeFlore*, 493 U.S. at 126.

In any event, the plain-text interpretation actually gives the third clause of the anti-retaliation provision substantial meaning. That clause states that a whistleblower is protected for "making disclosures that are required or protected" under certain federal laws. 15 U.S.C. 78u-6(h)(1)(A)(iii). Those disclosures need not be made to the SEC; they could be made to another entity, such as the individual's employer, another federal agency, or Congress. By incorporating the definition of "whistleblower," which requires reporting to the SEC, the anti-retaliation provision protects a whistleblower who reports misconduct *both* to the SEC *and* to another entity, but suffers retaliation "because of" the non-SEC disclosure. 15 U.S.C. 78u-6(h)(1)(A). So read, the third clause of the anti-retaliation provision covers a class of "whistleblowers" that the first and second clauses do not. See pp. 21-23, *supra*.

Lower courts have seemingly assumed that there are few, if any, individuals who report both internally and to the SEC and then face retaliation for the internal reporting. See Pet. App. 8a; *Berman*, 801 F.3d at 152. But there is no valid basis for that assumption. Indeed, because the SEC is required to protect the identity of whistleblowers, see 15 U.S.C. 78u-6(h)(2)(A), an employer will often be unaware that an employee has reported to the SEC. In that circumstance, any retaliation will necessarily be tied to the non-SEC disclosure.

Nor is it merely a theoretical possibility that an employer might retaliate against an employee in precisely

those circumstances. For example, in *Kramer* v. *Trans-Lux Corp.*, Civ. No. 11-1424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012), an employee reported alleged misconduct to his superiors; then to the company's audit committee; and then to the SEC. See *id.* at *2-*3. The company allegedly began taking adverse action against the employee before his reporting to the SEC and took additional adverse action afterwards. See *ibid.*[4] Assuming that the employee reported to the SEC in the prescribed manner, see *id.* at *5, an employee in that situation would be protected by the third clause of the anti-retaliation provision.

What is more, lower courts have seemingly overlooked the category of cases in which an individual reports not internally, but instead both to the SEC and to another entity (such as to another federal agency, a law-enforcement official, or Congress). See 18 U.S.C. 1513(e), 1514A(a)(1). In those cases, too, an employee who suffered retaliation on account of the non-SEC disclosure would be protected by the third clause.

b. Lower courts have also suggested that a plain-text interpretation would be absurd because it would leave two specific groups of whistleblowers—lawyers and outside auditors—without a remedy under the Dodd-Frank Act's anti-retaliation provision. Those

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[4] Nor is it unusual for an employee to report both internally and to the SEC, as cases involving the Sarbanes-Oxley Act's anti-retaliation provision demonstrate. See, *e.g.*, *Gunther* v. *Deltek, Inc.*, ARB Nos. 13-68 & 13-69, 2014 WL 6850017, at *1 (DOL Adm. Rev. Bd. Nov. 26, 2014) (involving an employee who filed complaints of alleged wrongdoing with management and the SEC); *Menendez* v. *Halliburton, Inc.*, ARB Nos. 09-2 & 09-3, 2011 WL 4915750, at *2 (DOL Adm. Rev. Bd. Sept. 13, 2011) (involving an employee who reported concerns regarding accounting practices to the SEC and then to his employer's audit committee).

courts have assumed that, because outside auditors and certain lawyers are required to report wrongdoing they discover to company management, any retaliation would occur before the lawyer or auditor could report to the SEC. See Pet. App. 8a; *Berman*, 801 F.3d at 151-152.

As a preliminary matter, those courts have offered no support for the empirical assumption that any retaliation would occur immediately. But more broadly, there is no reason to believe that Congress particularly wanted to sweep lawyers and auditors within the ambit of the third clause (or, for that matter, the anti-retaliation provision more generally). To be sure, the third clause expressly refers to a provision concerning internal audit committees. See 15 U.S.C. 78u-6(h)(1)(A)(iii) (citing 15 U.S.C. 78j-1(m)). But the disclosures protected by that provision are reports by *employees* to audit committees regarding "questionable accounting or auditing matters," 15 U.S.C. 78j-1(m)(4)(B), and the reference to that provision makes clear that such a disclosure is protected under the anti-retaliation provision. Nothing about that reference, or anything else in the Dodd-Frank Act's anti-retaliation provision, indicates an affirmative intention to sweep in lawyers or auditors.[5]

The Sarbanes-Oxley Act's anti-retaliation provision stands in sharp contrast. As this Court recently explained in *Lawson*, that provision was specifically in-

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[5] In *Berman*, the Second Circuit observed that "[a]uditors are subject to subsection 78j-1 of the Exchange Act" and stated that the third clause of the Dodd-Frank Act's anti-retaliation provision "express[ly] cross-reference[s]" that provision, as if to suggest that the Congress that enacted the Dodd-Frank Act must have had auditors in mind. 801 F.3d at 151. But Congress specifically cross-referenced only subsection (m) of Section 78j-1, which involves reporting by *employees* to internal audit committees.

tended to cover outside professionals such as lawyers and auditors, as well as employees of companies. See 134 S. Ct. at 1169-1170. In *Lawson*, the Court concluded that employees of private contractors working for publicly traded companies can invoke the Sarbanes-Oxley Act's anti-retaliation provision upon suffering retaliation from their employers. See *id.* at 1176. The Court noted that retaliation by outside firms helped to keep the Enron scandal under wraps and that Congress enacted the anti-retaliation provision to encourage reporting by the employees of such firms. See *id.* at 1169-1170. Even if certain lawyers and auditors are outside the scope of the Dodd-Frank Act's anti-retaliation provision, therefore, they would be covered by the provision Congress intended for them under the Sarbanes-Oxley Act.

In any event, this Court has no obligation to stretch the Dodd-Frank Act's anti-retaliation provision to encompass categories of individuals that the plain text of the provision does not reach—even if it were desirable to do so as a policy matter. As this Court has noted, "Congress typically legislates by parts[,] addressing one thing without examining all others that might merit comparable treatment," and "this Court does not revise legislation * * * just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2033 (2014). Instead, the relevant inquiry is whether the result is "so bizarre that Congress could not have intended it." *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 347 (1994) (internal quotation marks and citation omitted). An anti-retaliation provision that applies only to the defined category of "whistleblowers," but does not reach lawyers and auditors already covered by another anti-retaliation provision, is hardly in that category.

c. The SEC has also contended that, because the statutory definition of "whistleblower" contains the words "to the Commission," applying that definition to the anti-retaliation provision would render redundant the references to the SEC in the first and second clauses. See, *e.g.*, *Berman*, 801 F.3d at 154. But that contention ignores the fact that the "whistleblower" definition establishes the category of individuals protected from retaliation, whereas the three clauses set out the conduct that gives rise to a cause of action for retaliation. See 15 U.S.C. 78u-6(h)(1)(A). To invoke the anti-retaliation provision, an individual must *both* qualify as a "whistleblower" *and* suffer retaliation "because of" protected activity. *Ibid.* The fact that the same action may qualify a person as a "whistleblower" and trigger the conduct that gives rise to a cause of action—for example, reporting a securities-law violation "to the Commission"—does not create any redundancy or superfluity in the statute.

To be sure, it is theoretically possible that Congress could have written the statute more economically to avoid repeating "to the Commission" twice. But Congress is under no obligation to draft statutes with the fewest number of words possible. Congress may include "technically unnecessary" language to clarify or "remove any doubt" about an issue, and such clarifying language is not surplusage. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (citation omitted); see, *e.g.*, *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 385 (2013). Here, Congress used similar language to define the category of individuals eligible to invoke the anti-retaliation provision and to define some of the conduct protected by that provision. There is nothing absurd about its decision to structure the statute in that way.

d. In arguing that a plain-text interpretation would produce absurd results, lower courts have placed great

weight on the Court's recent decision in *King* v. *Burwell*, 135 S. Ct. 2480 (2015). See Pet. App. 7a-8a; *Berman*, 801 F.3d at 150. But this case bears no resemblance to the unique facts of *King*. There, the Court construed a 900-page statute containing a "series of interlocking reforms designed to expand coverage in the individual health insurance market." 135 S. Ct. at 2485. After determining that the precise language at issue was ambiguous, see *id.* at 2491, the Court looked to the "broader structure of the Act to determine [its] meaning," and it chose the interpretation that was consistent with "Congress's plan" in enacting the statute as a whole, *id.* at 2492-2496.

This case, by contrast, involves the application of an expressly defined term in a single section of the Dodd-Frank Act. There is no relevant ambiguity either in the definition of "whistleblower" itself or in the applicability of that definition to the entire section, including the anti-retaliation provision. See pp. 16-18, *supra*. And as discussed above, applying the statutory definition of "whistleblower" to the anti-retaliation provision is perfectly consistent with "Congress's plan" to encourage the reporting of securities-law violations to the SEC. 135 S. Ct. at 2496; see pp. 24-26, *supra*.

2. If any interpretation would produce absurd results, it is the atextual interpretation adopted by the Ninth Circuit. The third clause of the anti-retaliation provision states that "[n]o employer" may retaliate against a whistleblower for "making disclosures that are required or protected" under a vast array of federal laws, including (1) the Sarbanes-Oxley Act of 2002; (2) "this chapter" (*i.e.*, the Securities Exchange Act of 1934); (3) Section 1513(e) of Title 18, a federal criminal statute prohibiting retaliation against witnesses; or (4) "any other law, rule, or regulation subject to the jurisdiction of the Commission" (including the Securities Act of 1933,

the Investment Company Act of 1940, and the Investment Advisers Act of 1940). 15 U.S.C. 78u-6(h)(1)(A)(iii). Without the limitations that the "whistleblower" definition provides, that clause would confer absurdly broad protection in situations having nothing to do with violations of the securities laws.

Consider, for example, an employee who is fired because he reported to the Federal Bureau of Investigation that a co-worker was dealing illegal drugs. Or consider an employee who is fired because he reported to a supervisor that a colleague defrauded a customer, in violation of the federal mail-fraud statute. Those disclosures have nothing to do with the securities laws or the SEC. But the first disclosure would be "protected" under 18 U.S.C. 1513(e), which covers any person who "provid[es] to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense," and the second disclosure would be "protected" by the Sarbanes-Oxley Act's anti-retaliation provision, 18 U.S.C. 1514A(a)(1)(C). Without the limitations that the definition of "whistleblower" provides—specifically, that the individual provide information to the SEC and that the information relate to "a violation of the securities laws," 15 U.S.C. 78u-6(a)(6)—the employees in those scenarios would have a cause of action under the Dodd-Frank Act's anti-retaliation provision. Such a result, of course, would be completely out of step with the rest of Section 922(a) of the Dodd-Frank Act, which was intended to create incentives for individuals to report securities-law violations to the SEC. See pp. 20-24, *supra*.

* * * * *

At bottom, there is simply no good reason here to deviate from the plain text of the statute—and, indeed, there is good reason to adhere to it. The Court should

"apply faithfully the law Congress has written," *Henson*, 137 S. Ct. at 1725, and adopt an interpretation of the anti-retaliation provision that requires a plaintiff to satisfy the statutory definition of "whistleblower" by reporting a securities-law violation to the SEC.

C. The SEC's Contrary Interpretation Is Not Entitled To Deference

Finally, the Ninth Circuit reasoned that, to the extent that the Dodd-Frank Act's whistleblower provisions are ambiguous, the SEC's interpretation of those provisions is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 10a-11a. That reasoning is incorrect for two reasons. First, there is no ambiguity in the whistleblower provisions, and an agency is not entitled to deference where Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Second, the SEC's rule adopting its more expansive interpretation was procedurally defective, because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). For those reasons, the Ninth Circuit erred in according deference to the SEC's interpretation.

1. As discussed above, there is no ambiguity in the Dodd-Frank Act's whistleblower provisions. The text, structure, and history all point to the conclusion that the anti-retaliation provision applies only to a "whistleblower," as the statute defines the term. See pp. 16-30, *supra*.

Indeed, it is hard to imagine an agency interpretation that is more blatantly inconsistent with a statutory provision than this one. By its terms, the statutory provision defining "whistleblower" makes clear that the defi-

nition "shall apply" "[i]n this section": *i.e.*, to the award and anti-retaliation provisions alike. 15 U.S.C. 78u-6(a). In its final rule, however, the SEC set forth *two* definitions of "whistleblower": one (tracking the statutory definition) that applies for purposes of the award provision, see 17 C.F.R. 240.21F-2(a)(1), and another that applies only "[f]or purposes of the anti-retaliation [provision]," 17 C.F.R. 240.21F-2(b)(1).

It could not be clearer, moreover, that the latter definition departs from the statutory definition. Worse still, the SEC simply picked and chose the elements of the statutory definition that it liked. Most notably for present purposes, the SEC simply abandoned the statutory requirement that the individual report alleged misconduct *to the SEC*, instead defining "whistleblower" by reference to the substantive activity protected by the anti-retaliation provision. See 17 C.F.R. 240.21F-2(b)(1)(ii). But perhaps recognizing the obvious overbreadth of the resulting interpretation, see pp. 37-38, *supra*, the SEC sought to limit the scope of its substitute definition by requiring that the individual "possess[es] a reasonable belief that the information [the individual] [is] providing relates to a possible securities law violation." 17 C.F.R. 240.21F-2(b)(1)(i). The SEC thus retained a remnant of the statutory requirement that the reported misconduct relate to a "violation of the securities laws," 15 U.S.C. 78u-6(a)(6), but omitted the requirement that the report be "to the Commission," *ibid.*

To state the obvious, the SEC does not have the authority to rewrite the statute in that nakedly legislative manner.[6] As this Court recently explained, "*Chevron*

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[6] Notably, members of both houses of Congress recently proposed a bill amending Section 78u-6 to remove the "whistleblower" defini-

allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2708 (2015). The Court need go no further to conclude that the SEC's interpretation is not entitled to deference.

2. Even if the whistleblower provisions were ambiguous, the SEC's interpretation would still not be entitled to deference, because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars*, 136 S. Ct. at 2125.

a. One of the most fundamental procedural requirements of rulemaking is that the notice of proposed rulemaking must include "either the terms or the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). In other words, the proposed rule must give "fair notice" of the final rule's contents. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007).

The SEC's rulemaking flunked that requirement. In its notice of proposed rulemaking, the SEC proposed a rule that, consistent with the statutory definition, would have defined a "whistleblower" as an individual who "provide[s] information *to the Commission* that relates to a potential violation of the securities laws." 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added). Six months later, however, the SEC reversed course in its final rule, unveiling its more expansive al-

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tion, but the proposal died in committee before any significant action. See Whistleblower Augmented Reward and Nonretaliation Act of 2016, H.R. 4619, 114th Cong. § 4(a) (2016); Whistleblower Augmented Reward and Nonretaliation Act of 2016, S. 2591, 114th Cong. § 4(1) (2016).

ternative definition of "whistleblower" for purposes of the anti-retaliation provision and abandoning the statutory requirement of reporting to the SEC. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011).

That change was as unheralded as it was drastic. In its notice of proposed rulemaking, the SEC gave no hint that it was considering expanding the definition of "whistleblower" beyond the statutory definition to include individuals who have not reported alleged misconduct to the SEC, nor did it request comment on such an expansion. See 75 Fed. Reg. 70,489. And the SEC did not cite any of the more than 240 comments it received when it deviated from its proposed rule and adopted its more expansive alternative definition of "whistleblower" in the final rule.

This is therefore the paradigmatic situation in which an agency has failed to give "fair notice" of the contents of its final rule. *Long Island Care at Home*, 551 U.S. at 174. The final rule here cannot be justified as a "logical outgrowth" of the proposed rule, because the two are flatly inconsistent with each other. *Ibid.* (citation omitted). And as a result of the failure to provide fair notice—indeed, any notice—of what it was doing, the SEC deprived potentially affected parties of the "opportunity to respond to the proposal." *AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (citation omitted). As a result, the SEC's interpretation in the final rule is invalid and not entitled to *Chevron* deference.

b. The SEC's final rule was also defective because the SEC did not adequately explain why it was expanding the definition of "whistleblower" beyond the statutory definition (even assuming it could have validly done so). Another fundamental requirement of rulemaking is that "an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. To meet

that requirement, an agency's explanation must be "clear enough that its path may reasonably be discerned." *Ibid.* (internal quotation marks and citation omitted).

The SEC's rulemaking flunked that requirement as well. The only "explanation" the SEC offered in its final rule for its novel interpretation was the following: "[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission." 76 Fed. Reg. 34,304 (emphasis omitted). That statement does not explain anything; it simply recites (incorrectly) the text of the statute. The SEC did not "analyze or explain" why it believed that interpretation was "more consistent with statutory language than alternative [interpretations]." *Encino Motorcars*, 136 S. Ct. at 2127 (internal quotation marks and citations omitted). Nor did the SEC explain why it was abandoning the definition that it had proposed in its notice of proposed rulemaking. And the SEC did not say "what (if anything) it found persuasive" in any of the more than 240 comments it received that compelled it to broaden the "whistleblower" definition for purposes of the anti-retaliation provision. *Id.* at 2127.

In short, the SEC failed to offer any explanation, let alone a substantial one, for its unexpected redefinition of the term "whistleblower." And it certainly did not draw a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). For that reason, too, the SEC's interpretation in the final rule is invalid and not entitled to *Chevron* deference.

c. In apparent recognition of the deficiency of the final rule, the SEC issued further guidance several years later, purporting to interpret parts of the rule in the wake of the Fifth Circuit's decision in *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (2013). See 80 Fed. Reg. 47,829 (Aug. 10, 2015). In that guidance, the SEC sought to explain why it believed its definition of "whistleblower" best achieved its "overall goals in implementing the whistleblower program." *Id.* at 47,830.

Such *post hoc* interpretative guidance, however, cannot cure the procedural defects in its final rule. It is a "foundational principle of administrative law" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 135 S. Ct. at 2710 (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943)). The grounds that the SEC invoked when it took the action of redefining the term "whistleblower" were plainly deficient. See *ibid.* An agency cannot paper over such a deficiency by issuing an interpretive rule—without notice and comment—years after the fact. Cf. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (declining to defer to "*post hoc* rationalization[s] advanced by an agency seeking to defend past agency action against attack" (internal quotation marks and citation omitted)).

* * * * *

As a result of those procedural defects, even if the whistleblower provisions were somehow ambiguous, the SEC's interpretation would be entitled to deference only insofar as it has the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Given the SEC's unexplained about-face in interpreting the statute; its selective incorporation of some aspects of the statutory definition but not others; and its anemic *post hoc* expla-

nation, the SEC's interpretation cannot meet even that more modest standard.

But more fundamentally, there is no statutory ambiguity for the SEC to resolve. By its plain terms, the Dodd-Frank Act's anti-retaliation provision requires a plaintiff to be a "whistleblower," and an individual must report a securities-law violation to the SEC in order to qualify. Because respondent concededly did not report the alleged misconduct at issue here to the SEC, he is not entitled to sue under the anti-retaliation provision. The Ninth Circuit's interpretation of the statute is atextual and simply untenable. Its judgment should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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v.

PAUL SOMERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

No. 16-1276

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATUTORY PROVISIONS INVOLVED

In addition to the provisions reproduced in petitioner's brief (at 2-3), Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified at 15 U.S.C. 78u-6, provides in relevant part:

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

* * *

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

STATEMENT

A. Statutory And Regulatory Background

In two landmark acts in the past 15 years, Congress sought to deter securities-related misconduct. In each

law, whistleblower protections and incentives figured prominently in achieving that goal.

1. In 2002, Congress enacted Sarbanes-Oxley "to 'prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.'" *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162 (2014) (quoting S. Rep. No. 107-146, 107th Cong., 2d Sess. 2 (2002)); see Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 746, 746. ("An Act [t]o protect investors by improving the accuracy and reliability of corporate disclosures"). The act represented an effort to "restor[e] trust in the financial markets" following a series of massive corporate scandals, most notably Enron's. S. Rep. No. 107-146 at 2. Enron had "used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." *Ibid.* Employees of both Enron and its accounting firm Arthur Andersen had participated in the fraud. *Lawson*, 134 S. Ct. at 1162. When other employees had tried to report the misconduct, including internally, "they faced retaliation, including discharge." *Ibid.* For instance, when one Enron employee attempted "to report accounting irregularities" internally, "the company sought advice on the legality of discharging" her, and Enron's outside counsel advised that there were no such restrictions. S. Rep. No. 107-146 at 5.

Congress accordingly "identified the lack of whistleblower protection as 'a significant deficiency' in the law." *Lawson*, 134 S. Ct. at 1162-1163 (quoting S. Rep. No. 107-146 at 10); cf., *e.g.*, Rachel Beller, *Whistleblower Protection Legislation Of The East And West: Can It Really Reduce Corporate Fraud And Improve Corporate Governance?*, 7 N.Y.U. J. L. & Bus. 873, 879 (2011) (discussing whistleblowers' "pivotal role in revealing corporate

fraud"). That was especially true for accountants and lawyers, who "[i]nstead of acting as gatekeepers who detect and deter fraud," "assist[ed] the fraud" and helped "cover[] it up." S. Rep. No. 107-146 at 20-21. Sarbanes-Oxley thus sought to remodel "the incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent." *Id.* at 21; see *Lawson*, 134 S. Ct. at 1168, 1171 (emphasizing that Congress wanted to protect "countless professionals [like accountants and lawyers] equipped to bring fraud on investors to a halt").

Section 806 of Sarbanes-Oxley generally forbids widely-held public companies (and their subsidiaries and affiliates) from retaliating against whistleblowers who report internally or externally. 18 U.S.C. 1514A(a) (applying to any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))"); see *Lawson*, 134 S. Ct. at 1161, 1174. Under Section 1514A(a), titled "Whistleblower Protection for Employees of Publicly Traded Companies," these employees are protected for reporting "a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders," when they report to a federal agency, member or committee of Congress, or a supervisor or other internal investigative authority within the employer. 18 U.S.C. 1514A(a)(1)(A)-(C).

Section 1514A broadly authorizes "all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). That includes reinstatement, backpay, and special damages like emotional distress and reputational harm. See 18 U.S.C. 1514A(c)(2). It also prohibits pre-dispute arbitration agreements. 18 U.S.C. 1514A(e).

To obtain relief, the whistleblower must file a complaint with the Secretary of Labor within 180 days of the violation or the date she became aware of the violation, 18 U.S.C. 1514A(b)(1)(A), (b)(2)(D),[1] and can file suit in district court if a final decision is not issued within 180 days, 18 U.S.C. 1514A(b)(1)(B). The Secretary delegated to the Occupational Safety & Health Administration (OSHA) the responsibilities to handle complaints. On receipt of an administrative complaint, OSHA conducts an investigation if certain requirements are met. 29 C.F.R. 1980.104(a), (e). After completing the investigation, OSHA issues findings and, if "there is reasonable cause to believe that a violation has occurred," a preliminary order for make-whole relief. 29 C.F.R. 1980.105(a)(1). If the preliminary order requires reinstatement, that portion of the order is "effective immediately" on the company's receipt of the findings and preliminary order. 29 C.F.R. 1980.105(c).

The preliminary order is subject to two layers of administrative review: an appeal to an administrative law judge and then a petition for review with the Administrative Review Board. See 29 C.F.R. 1980.106-1980.110. During the administrative-review process, the Assistant Secretary for OSHA "may participate as a party or as amicus curiae at any time." 29 C.F.R. 1980.108(a)(1). After the administrative order becomes final, an aggrieved party may seek judicial review in circuit court under the strictures of the APA. See 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1980.112(a); 18 U.S.C. 1514A(b)(2) (incorporating the procedures of 49 U.S.C. 42121).

2. Despite Congress's efforts to curb abuse under Sarbanes-Oxley, corporate misconduct contributed to another financial crisis that culminated in 2008. See, *e.g.*, S.

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[1] This period was originally 90 days.

Rep. No. 176, 111th Cong., 2d Sess. 2 (2010) (Dodd-Frank "is a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy"); U.S. SEC, *SEC Enforcement Actions Addressing Misconduct That Led To Or Arose From The Financial Crisis* (Oct. 7, 2016). Congress again responded with comprehensive legislation "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). And again Congress sought to advance that goal with a robust whistleblower provision. See, *e.g.*, 156 Cong. Rec. S5872, S5913, S5929 (daily ed. July 15, 2010) (statements of Sens. Cardin, Leahy, and Dodd).

Section 922 of Dodd-Frank (Section 21F of the Exchange Act) uses two devices to promote whistleblowing: monetary awards and anti-retaliation protections.

First, under the award provisions, a whistleblower who provides "original information" to the SEC that leads to "the successful enforcement" of an SEC action resulting in monetary sanctions over $1 million is entitled to a portion of the recovered sanctions. 15 U.S.C. 78u-6(a)(1), (b)(1). Congress limited the award program to individuals who reported to the SEC because the program revolves around the SEC using that information to prosecute an action, and it is undisputed that, for purposes of the program, a "whistleblower" is "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). While the incentives are powerful in theory, they have been limited in practice: Between August 2011 and the end of fiscal year 2016, the SEC received 18,334 tips, but made awards

to only 34 whistleblowers. U.S. SEC, *2016 Annual Report To Congress On The Dodd-Frank Whistleblower Program* 10, 23 (2016).

The second component of Dodd-Frank's whistleblower provision is its anti-retaliation protections, 15 U.S.C. 78u-6(h), which provides whistleblowers a direct private right of action. "No employer may" retaliate against a "whistleblower" for taking "any lawful act" in three scenarios. 15 U.S.C. 78u-6(h)(1)(A). The first two categories protect actions related to reporting to the SEC: "providing information to the Commission in accordance with this section" and "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(i), (ii).

Those protections (and the award program) were in the draft of Dodd-Frank passed by the House and Senate. The third category of anti-retaliation protections, however, was not added until much later, when the House and Senate conferees prepared a conference base text. See *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 152-153 (2d Cir. 2015) (recounting the history). This new category, in Subdivision (iii), refers broadly to a variety of laws that cover reporting to entities and individuals *other* than the SEC: "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii). Those incorporated provisions include ones that allow certain individuals—like auditors and attorneys—to report outside an organization (if at all) only after first reporting internally. See 15 U.S.C. 78j-1(b); 15 U.S.C. 7245.

By prohibiting retaliation regarding a broad category of protected disclosures, this provision supplements Sarbanes-Oxley's anti-retaliation provision, which had proven ineffective for the broad majority of whistleblowers. Cf., *e.g.*, Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers? The Recent Experience of Companies & Whistleblowing Workers Under SOX*, 1 Wm. & Mary Bus. L. Rev. 431, 432-435 (2010) (discussing empirical research on Section 1514A's ineffectiveness).

To enforce these protections, Section 78u-6 provides the whistleblower a private right of action in federal district court. 15 U.S.C. 78u-6(h)(1)(B)(i). Suit must be brought within either "6 years after the date on which the violation" occurred or "3 years after the date when" the material facts were "known or reasonably should have been known by the employee," though in no circumstances more than 10 years after the violation. 15 U.S.C. 78u-6(h)(1)(B)(iii). A prevailing plaintiff is entitled to reinstatement and two times backpay, but not special damages. See 15 U.S.C. 78u-6(h)(1)(C).

The whistleblower provisions of Dodd-Frank and Sarbanes-Oxley thus differ in multiple ways. In some important respects, Dodd-Frank's anti-retaliation whistleblowing protection is broader than its Sarbanes-Oxley counterpart: it does not require exhaustion; it imposes a longer limitations period; it provides for double backpay; and it restrains the actions of companies beyond those with a class of securities registered under 15 U.S.C. 78l or that file reports under 15 U.S.C. 78o (and their subsidiaries) (see 18 U.S.C. 1514A(a)).

But in other respects, Sarbanes-Oxley's whistleblower provision is more generous: it permits "special damages" like emotional-distress damages; it gives an employee the benefit of OSHA's investigative assistance; the employee

can obtain immediate reinstatement through the Sarbanes-Oxley administrative process; and Sarbanes-Oxley claims are not subject to pre-dispute arbitration provisions. Therefore, even if Sarbanes-Oxley generally has not been as effective as Congress had wished, there are still advantages for certain individuals to seek relief under Section 1514A.

3. In enacting Dodd-Frank, Congress expressly charged the SEC with "the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [Section 78u-6] consistent with the purposes of this section," 15 U.S.C. 78u-6(j), and ordered the agency to issue final regulations "not later than 270 days after July 2, 2010," 15 U.S.C. 78u-7(a).

Under that authority, the SEC published its notice of proposed rulemaking in November 2010. See 75 Fed. Reg. 70,488 (Nov. 17, 2010). A central focus of the notice was how to "preserv[e] [the] critical role for corporate self-policing and self-reporting." *Id.* at 70,496. The SEC explained that it "want[ed] to implement [Section 78u-6] in a way that encourages strong company compliance programs." *Ibid.*; see, *e.g.*, *id.* at 70,488, 70,514. The SEC recognized that internal reporting plays a substantial role in deterring and detecting corporate misconduct, and that promoting internal reporting harmonized Section 78u-6 with Sarbanes-Oxley. *Id.* at 70,518. The SEC therefore requested comment on "alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of" the statute, *id.* at 70,495, and also whether "the application of the anti-retaliation provisions [should] be limited or broadened in any other ways," *id.* at 70,511; see also, *e.g.*, *id.* at 70,497 ("[C]onsistent with Section 21F, how can the potential

negative impact on compliance programs be minimized?").

In response, some commenters proposed an obvious mechanism for encouraging internal reporting while reducing its risks: protect internal reporting. For example, several corporations (including Microsoft, Merck, Procter & Gamble, and Hewlett-Packard) recommended that, consistent with their advocacy for internal-reporting requirements, "[a] whistleblower who submits a good-faith report through an internal compliance program—like a whistleblower who submits a statement—under penalty of perjury to the Commission—should be entitled to the protection of the anti-retaliation provisions of Section 21F, beginning at the time of submission." Comment Letter 13 (Dec. 17, 2010).[2] And the District of Columbia Bar suggested "expand[ing] the anti-retaliation protections to apply to internal programs" and noted that Subdivision (iii) "allows the Commission to" do so. Comment Letter 4, D.C. Bar (Dec. 17, 2010).[3]

Those specific suggestions mirrored other commenters' broader assessments of internal reporting. The business community in particular emphasized the importance of internal reporting and its central role in Congress's overall regulatory scheme.[4] As they explained (and the

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[2] Available at https://www.sec.gov/comments/s7-33-10/s73310-150.pdf.

[3] Available at https://www.sec.gov/comments/s7-33-10/s73310-146.pdf.

[4] Petitioner's Code of Conduct, in fact, instructs employees to report misconduct "to your supervisor," the general counsel, or through a telephone hotline. See Digital Realty Trust, Inc. Code of Business Conduct & Ethics 6, available at http://investor.digitalrealty.com/investor-relations/corporate-governance/governance-guidelines-and-documents/default.aspx.

agency recognized), internal reporting "[a]llow[s] companies to take appropriate actions to remedy improper conduct at an early stage," "[a]void[s] undermining internal compliance programs," "supplement[s], rather than supersede[s]" Sarbanes-Oxley's whistleblower protections, and "preserve[s] [the SEC's] scarce resources by relying upon internal compliance programs." 76 Fed. Reg. 34,300, 34,324 (June 13, 2011). Other commenters, however, noted problems with requiring internal reporting, namely, that it would "[p]lace whistleblowers at risk of retaliation," and that fear would "[r]esult in whistleblowers deciding not to report misconduct" at all. *Ibid.*

In adopting the final rule, the SEC reiterated that "[a] significant issue discussed in the Proposing Release was the impact of the whistleblower program on companies' internal compliance processes," and it thus sought to balance both sides of the debate. 76 Fed. Reg. at 34,300-34,301. The SEC recognized that internal reporting "may limit false and frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently." *Id.* at 34,359 n.450. At the same time, it concluded that strictly requiring internal reporting would not always achieve securities-law compliance and would be inconsistent with Section 78u-6. *Id.* at 34,324-34,326. Accordingly, while the SEC declined to require internal reporting, it nonetheless modified the proposed rules "to further incentivize whistleblowers to utilize their companies' internal compliance reporting systems when appropriate." *Id.* at 34,300-34,301; see *id.* at 34,324.

Next, having created a strong incentive to report internally (as urged by corporate stakeholders), the SEC also attacked a powerful disincentive to internal reporting: fear of retaliation. The final rule specified that, "[f]or

purposes of the anti-retaliation protections" of Section 78u-6, an individual is a whistleblower even if he did not report to the SEC. 17 C.F.R. 240.21F-2(b)(1). The SEC stated that this change "reflects the fact that * * * the third category [of whistleblowers under Section 78u-6(h)(1)(A)] includes individuals who report to persons or governmental authorities other than the Commission." 76 Fed. Reg. at 34,304. And amid detailing the "[a]dditional incentives" for internal reporting, the SEC noted that internal reporters would be protected: "Employees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by [Section 78u-6(h)(1)(A)(iii)], which incorporates the broad anti-retaliation protections of Sarbanes-Oxley." 76 Fed. Reg. at 34,325 n.223.

4. In 2015, the SEC reasserted its construction of Section 78u-6 with an interpretive rule. See 80 Fed. Reg. 47,829 (Aug. 10, 2015). It explained that the apparent disconnect between Section 78u-6(a)(6) and Subdivision (iii) of Section 78u-6(h)(1)(A) made the statute "ambiguous on the issue of the scope of the employment retaliation protections afforded thereunder." *Id.* at 47,829. The SEC stated that protecting internal reporting "best comports with our overall goals in implementing the whistleblower program" by "remov[ing] a potentially serious disincentive to internal reporting" that would conflict with the objective "to encourage internal reporting." 80 Fed. Reg. at 47,830. The guidance expressly rejected the Fifth Circuit's view that an individual must report to the SEC to qualify for those protections. *Id.* at 47,829-47,830 (discussing *Asadi* v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013)).

B. Facts And Procedural History

1. From 2010 to 2014, respondent worked as a Vice President of Portfolio Management for petitioner, a publicly-traded real-estate investment trust. Pet. App. 14a. Petitioner recognized respondent's exemplary performance throughout his tenure (until his pretextual termination), exceeding his annual bonus target each year. C.A. E.R. 125. Respondent's successful performance led petitioner to transfer him to its Asian Pacific region as that region's number-two employee under Senior Vice President Kris Kumar. *Ibid.* Driven by respondent's efforts, petitioner's Asian Pacific operations thrived: they expanded from 10 to 100 employees, increased petitioner's real-estate holdings from zero to nearly one million square feet, and invested almost $850 million dollars in new properties. *Ibid.* Respondent's salary at the time of his termination was over $200,000, and he held stock grants of over $625,000. *Ibid.*

Before petitioner terminated respondent, he alerted "senior management regarding possible securities law violations by the company." Pet. App. 3a. For example, he reported that "Kumar had committed a number of acts of 'serious misconduct,' including 'hiding [] seven million dollars in cost overruns'" on one development. *Id.* at 14a. Shortly thereafter, petitioner terminated respondent. He "was not able to report his concerns to the SEC before" his termination. *Id.* at 3a.

2. Respondent sued petitioner for violating Dodd-Frank's anti-retaliation whistleblower protections. Petitioner moved to dismiss, arguing that respondent was not a "whistleblower" under Section 78u-6 "because he did not report any alleged law violations to the SEC." Pet App.

17a. Petitioner did not challenge, and the court did not address, Rule 21F-2's procedural validity or whether the *Chevron* framework applied.[5]

The district court denied the motion. It explained that "[t]he determinative issue for resolving [petitioner's] motion to dismiss is whether SEC Rule 21F-2(b)(1) is entitled to *Chevron* deference." Pet. App. 22a. In examining whether Section 78u-6 unambiguously forecloses the SEC's interpretation, the court rejected petitioner's argument that Section 78u-6(a)(6)'s definition of "whistleblower" controls the outcome. *Id.* at 25a-30a. The court noted that, "while a statutory definition provides a 'very strong indication' of a term's meaning, it is 'nonetheless one that can be contradicted by other indications,'" such as when its "'artificial'" definition "'would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two.'" *Id.* at 27a-28a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)).

As the court reasoned, several aspects of the statutory scheme rendered the provisions ambiguous. For instance, the court explained that petitioner's interpretation would render Subdivision (iii) of Section 78u-6(h)(1)(A) superfluous, even assuming that that provision protects an individual who reports a violation both internally and to the SEC, because some statutes covered by Subdivision (iii) permit external reporting only in limited circumstances (if at all). *Id.* at 32a (discussing *Asadi*, 720 F.3d at 627-628).

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[5] Petitioner also argued that respondent's failure to exhaust his administrative remedies under Sarbanes-Oxley doomed his Dodd-Frank whistleblower claim, but the court found this waived because it was asserted for the first time in petitioner's reply brief.

For instance, 15 U.S.C. 78j-1 requires an auditor to internally report misconduct, and allows external reporting only if the company fails to adequately respond. Pet. App. 33a-34a. Likewise, under 15 U.S.C. 7245 and corresponding SEC rules, attorneys may report violations externally only in rare situations, which leaves them "largely (if not entirely) unprotected from retaliation under" petitioner's understanding of Section 78u-6. *Id.* at 34a-35a. As more support for the statute's ambiguity, the court explained that a proper understanding of the Dodd-Frank and Sarbanes-Oxley whistleblower provisions retained meaning for the latter because a whistleblower may "prefer" Sarbanes-Oxley's scheme. *Id.* at 38a-39a. Moreover, petitioner's contrary interpretation would undermine Subdivision (iii)'s effectiveness "'as a preventative measure because employers would not know that a report was made to the Commission.'" *Id.* at 39a (citation omitted).

Finding the statute amenable to the SEC's interpretation, the court quickly resolved step 2 of the *Chevron* analysis: the SEC's construction was reasonable, because, among other things, it "encourages internal reporting" and "enhances" the statute's deterrent effects. *Id.* at 41a-43a.

The court accordingly denied petitioner's motion to dismiss, but certified for interlocutory appeal under 28 U.S.C. 1292(b) the question whether respondent qualified as a "whistleblower" for the anti-retaliation protections. *Id.* at 46a-47a.

3. The Ninth Circuit granted permission to appeal, and a divided panel affirmed. Pet. App. 1a-11a. Like the district court, the majority observed that definitional provisions "'can be contradicted by other indications,'" *id.* at 7a (quoting Scalia & Garner at 228), and wrote that by "[b]y broadly incorporating * * * Sarbanes-Oxley's disclosure

requirements and protections," Section 78u-6 "necessarily bars retaliation against" internal reporters. *Id.* at 6a. As the majority explained, "[p]rovisions of Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting." *Id.* at 6a-7a (discussing 15 U.S.C. 78k-1 & 7245). Leaving those reporters unprotected, the panel found, "would result in early retaliation before the information could reach the regulators." *Id.* at 7a. The court also rejected the Fifth Circuit's assertion that Sarbanes-Oxley's whistleblower protections "would be rendered moot or superfluous." *Id.* at 9a (citing *Asadi*, 720 F.3d at 628-629). Again, "Sarbanes-Oxley may be more attractive to the whistleblowing employee" who wants OSHA to spearhead the claims process or "who has suffered more substantial emotional injury than financial harm." *Ibid.* The majority therefore held that Subdivision (iii) "protect[s] those who report internally," and even if ambiguous, the SEC's interpretation was entitled to deference. *Id.* at 10a.

Judge Owens dissented. Pet. App. 11a. Without elaboration, he expressed his agreement with the Fifth Circuit in *Asadi* and the dissent in *Berman*. *Ibid.*

As in the district court, petitioner did not challenge Rule 21F-2's *procedural* validity (including any alleged notice-and-comment deficiencies), and neither the majority nor the dissent addressed it.

SUMMARY OF ARGUMENT

This is a *Chevron* case. The question is not simply a matter of construing the statute; Congress specifically tasked the SEC with enforcing these provisions, and the SEC has construed Dodd-Frank's anti-retaliation provision in a manner that advances Congress's objectives. In order to upset that construction, petitioner must not

merely establish that its preferred construction is reasonable, but that it is *mandatory*. As the courts below found, however, the better reading is that Congress did not intend to gut Dodd-Frank's new protections for entire categories of employees who perform possibly the most important role in disclosing corporate misconduct. Petitioner's cramped reading is at odds with the statutory text, its purpose, its structure, and its history. It has not shown that the SEC's interpretation is wrong, much less *unambiguously* foreclosed. The judgment should be affirmed.

1. Petitioner rests the core of its case on the statutory definition found in Section 78u-6(a)(6). Yet there is no mechanical rule that courts automatically shut down whenever a definition section appears. This Court has repeatedly reaffirmed that a definitional section does *not* control if it is incompatible with the statutory scheme.

A. Petitioner's understanding is squarely at odds with the statutory text and structure. Once petitioner's wooden rule is set aside, it becomes immediately clear that Congress was using "whistleblower" in its ordinary sense in Section 78u-6(h)(1)(A). While the provision did use the term "whistleblowers," there is no indication that it was used in anything but its usual sense. The term is a common word with an established meaning. There is no indication that it was used as a term of art; on the contrary, Congress repeatedly switched back and forth between other common terms ("individuals," "employees") in providing separate details of the *same* cause of action. And it specifically cross-referenced provisions that likewise used the term "whistleblower" in its idiomatic usage—as protecting internal disclosures. Under any fair reading of Section 78u-6(h)(1)(A), Congress intended to

do exactly what it said: prohibit employers from retaliating against disclosures "required or protected" by specified laws.

B. Petitioner's view would directly undermine the statutory scheme, and create a bizarre cause of action in the process. The overall securities framework relies directly on internal reporting. Indeed, internal reporting is often *mandatory* before an individual even has the option of reporting to the SEC. It plainly frustrates the securities regime to require internal reporting and then leave that internal reporting unprotected.

Nor does it square with usual congressional practice to broadly prohibit retaliation for defined disclosures, but then withdraw that protection unless an individual makes a *separate* disclosure—one typically unknown to the bad actor. That leaves individuals exposed despite disclosing exactly the kind of information Congress wants out in the open. And it makes protection turn on the happenstance of whether the employee manages to file a report with the SEC before the employer can wrongfully terminate the relationship. Courts are typically reluctant to attribute such a peculiar intent to Congress without language far clearer than this.

Nor does the SEC's view threaten to render Sarbanes-Oxley's anti-retaliation scheme "effectively obsolete." Each protective scheme presents its own set of benefits and costs; parties have different reasons for preferring each one, which is presumably why Congress gave injured claimants a choice between available remedies. Cf. *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975). Indeed, even under petitioner's theory, there is a hypothetical subset of plaintiffs—those who use both internal and external reporting—that indisputably could invoke either set of remedies. No one seriously believes that this

choice threatens the "balance" between these integrated regulatory schemes.

C. Petitioner's argument is also out of step with the legislative history (and the realities of lawmaking). Subdivision (iii) was added at the last minute in a transparent effort to bolster whistleblower protection; it was not added to provide a heavily truncated remedy with virtually no realistic application. In the real world, it is entirely possible (indeed, probable) that the Conference Committee, at the last minute, failed to reconcile Congress's important new protections with the earlier definition of "whistleblower"—especially where no reconciliation was obviously needed (the context: a common term, a provision that protects *internal* reporting, and surrounding provisions using the term in common parlance to mean what it usually means—internal or external reporting).

2. Petitioner's tardy attack on the procedures used in SEC rulemaking is both improperly presented and meritless. The issue was not raised or resolved at any point below, and it was not asserted (or even mentioned) until the merits brief in this case. Even if the issue somehow falls within the Court's power to review, it should be set aside as a matter of prudence: it turns on a host of new points that no court has ever resolved, and it is too late for petitioner to reinvent its case in this Court.

In any event, the issue is insubstantial on the merits. The SEC's rule was a logical outgrowth of the notice-and-comment proceedings, where all parties were aware of the critical need to protect internal reporting. Petitioner cannot explain how it was prejudiced by any error, and it further cannot explain how it asserted the challenge within the APA's deadline for raising procedural attacks on past agency rulemaking.

The SEC exercised its expert judgment to read the statute sensibly to protect the overall securities scheme

and Congress's interest in these important issues—just as the SEC was explicitly charged to do. Petitioner's last-ditch attack on its rule is unavailing, and the judgment below should be affirmed.

ARGUMENT

I. THE SEC PROPERLY CONSTRUED DODD-FRANK'S ANTI-RETALIATION PROVISION TO PROTECT INTERNAL REPORTING AND ITS CENTRAL ROLE IN CONGRESS'S REGULATORY SCHEME

1. Petitioner frames this case as presenting a "simple question of statutory interpretation" (Br. 3), but that is wrong. This case does not simply involve construing a statute, but reviewing an *agency's construction* of that statute.

Congress expressly delegated authority to the SEC to administer Section 78u-6: "The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. 78u-6(j); see *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (describing breadth of analogous delegation). Petitioner has no real answer for this broad delegation of power, so it barely acknowledged the SEC's vital role in this process. It did not cite (much less reproduce) the controlling language of Section 78u-6(j). And petitioner did not grapple with how this textual delegation confirms Congress's view of the SEC's importance in construing these interlocking schemes (Dodd-Frank and Sarbanes-Oxley). But Congress did indeed expressly charge the SEC with enforcing these provisions, 15 U.S.C. 78u-6(j), and the SEC invoked that authority in construing the statute to protect internal whistleblowing, 17 C.F.R.

240.21F-2(b)(1)(ii). This Court's familiar *Chevron* framework thus applies.

"*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Michigan*, 135 S. Ct. at 2707 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). In order to set aside the agency's interpretation, petitioner must not merely establish that its preferred construction is reasonable, but that it is *mandatory*—the statute must "unambiguously foreclose[] the agency's interpretation." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). Unless Congress spoke to the "precise question" at issue, the agency's position is entitled to deference. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Under this inquiry, ambiguity is not determined by reading the challenged provision on its own. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132; see also, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. * * * Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting

any precedents or authorities that inform the analysis."); *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990).

"Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives," exercising "its experience and expertise in protecting the rights of those who are covered by the Act." *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 403 (2008).

2. According to petitioner, this traditional inquiry is short-circuited by the presence of Section 78u-6(a)(6)'s statutory definition: "Where 'a statute includes an explicit definition,' the Court 'must follow that definition, even if it varies from th[e] term's ordinary meaning.'" Br. 17 (quoting *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000)). Petitioner vastly overstates its case.

While "the terms of a definitional subsection are usually to be taken literally," "'[d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.'" *Berman*, 801 F.3d at 154 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 227-228 (2012)). Courts "need not read the statutory definition mechanically" into each provision, especially where doing so "would defeat the purpose of the legislation." *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983). "[W]e have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts." *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949).

Thus, contrary to petitioner's contention (Br. 16-19), "[t]he use of a term in one part of a statute 'may mean [a] different thing[]' in a different part, depending on context." Pet. App. 7a (quoting *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)); see also, *e.g.*, *Nw. Austin Mun. Util.*

Dist. No. One v. *Holder*, 557 U.S. 193, 206-207 (2009). A definitional section is not automatically controlling, and courts must still ask whether Congress intended the statutory definition to apply in each section of the Act. See *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 201 (1949); see also *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (rejecting "EPA's rigid insistence" that "the Act-wide definition[]" applies "no matter how incompatible that inclusion is with th[e] programs' regulatory structure").

3. As explained below, every indication here supports cabining Section 78u-6(a)(6)'s definition to its intended scope—which does *not* include Dodd-Frank's anti-retaliation provision. Once petitioner's wooden rule is set aside, it becomes immediately clear that Congress was using "whistleblower" in its ordinary sense in Section 78u-6(h)(1)(A). That construction alone explains the neighboring text in Subsection (h)(1) itself, the cross-referenced text in Sarbanes-Oxley, and the neighboring provisions of Dodd-Frank; it alone comports with the undeniable legislative purpose of Section 922, and the overall regulatory scheme—with its heavy emphasis on internal reporting; and it alone avoids creating a bizarre and incoherent statutory scheme, where protection is supplied (and withdrawn) effectively at random.

In the end, petitioner's cramped interpretation is directly at odds with Section 78u-6's text, purpose, structure, and history, which is precisely why the SEC (as the agency tasked with its enforcement) has *twice* rejected it in formal pronouncements. In order for petitioner to prevail, it must demonstrate that Congress unambiguously foreclosed the SEC's interpretation of the statute it was explicitly charged with administering. As the majority of

courts have determined, petitioner cannot overcome that heavy burden. The judgment should be affirmed.[8]

A. The Anti-Retaliation Provision's Text And Structure Confirm That Congress Did Not Limit Its Express Protection Of Internal Reporting To Those Who Report Externally To The SEC

Petitioner primarily stakes its case on the statutory definition in Section 78u-6(a)(6). But as explained above, there is no mechanical rule that courts inexorably apply a statutory definition in every surrounding provision. The presumption that the definition controls is simply that—*a presumption*. Although admittedly rare, courts will depart from that presumption in appropriate circumstances. *Nw. Austin*, 557 U.S. at 206-207; *Lawson*, 336 U.S. at 201. Section 78u-6's text and structure confirm that this is one of those unusual situations.

1. While Section 78u-6(h)(1) did use the term "whistleblowers," nothing suggests it was used in anything but its ordinary sense. The term is a common word with an established meaning. There is no indication it was used as a term of art. Congress did not use a capital "W" when identifying the targets of the prohibited retaliation, and it did not explicitly refer back to the definitional section. See *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) ("We have several times affirmed that identical language may convey varying content when used in different statutes,

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[8] If anything, the broad conflict below confirms the patent ambiguity in the statute. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("In light of the two dissents from the opinion of the Supreme Court of California, and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here.") (footnotes and internal citations omitted).

sometimes even in different provisions of the same statute.").

What Congress did do, however, was telling. Subdivision (iii) textually cross-references provisions in Sarbanes-Oxley that do *not* require reporting to the SEC *and yet define the protected class as "[w]histleblower[s],"* 18 U.S.C. 1514A(a)(1)(C) (Sarbanes-Oxley). Those incorporated provisions thus use the identical term—*referenced in Subdivision (iii) itself*—without any indication that Congress viewed "whistleblower" as a defined term of art. See *Nw. Austin*, 557 U.S. at 206; *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (looking to the "[t]extual cross-reference").

Moreover, Congress repeatedly switched back and forth between terms *in the very neighboring sections detailing the same cause of action.* See *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). Congress thus said that "[a]n individual"—not a "whistleblower"—can "enforce" this cause of action, 15 U.S.C. 78u-6(h)(1)(B)(i); it defined the limitations period by reference to when "the employee"—again, not the "whistleblower"—should have known of the violation, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(bb); and it switched yet again in enumerating the available relief "an individual" could recover, 15 U.S.C. 78u-6(h)(1)(C). These common terms carry no talismanic significance—Congress was using the terms ("whistleblower," "individual," "employee") interchangeably. See *Lawson*, 336 U.S. at 201 ("It is evident, therefore, that the definition of disability was 'not made with watch-like precision' and should not be so applied in § 8(f)(1)."). This is directly at odds with the notion that Congress deliberately, and only implicitly, placed a significant restriction on the scope of Subdivision (iii) by invoking a common term defined *seven subsections* earlier in the statute. *Utility Air Regulatory Group* v. *EPA*, 134 S.

Ct. 2427, 2441 (2014) ("the presumption of consistent usage 'readily yields' to context, and a statutory term—even one defined in the statute—'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies'"); see also *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595-596 (2004).

Finally, in the same section of Dodd-Frank (Section 922), Congress specifically amended aspects of Section 1514A—which, again, deals with internal reporting—and then *labeled those sections as "whistleblower protections."* See Section 922(c), (d)(1). Congress thus repeatedly used "whistleblower" as a common term with an accepted definition in ordinary usage. It did not treat the word as a term of art with a defined meaning *aside* from its treatment concerning the incentive-awards program. Compare *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("Although we generally presume that 'identical words used in different parts of the same act are intended to have the same meaning,' the presumption 'is not rigid,' and 'the meaning [of the same words] may well vary to meet the purposes of the law.'") (internal citations omitted); *Stenberg*, 530 U.S. at 992-993 & n.9 (Thomas, J., dissenting) ("By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding of 'partial birth abortion,' for that term itself, no less than the specific definition, is part of the statute. * * * It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning. But this does not mean that the ordinary and plain meaning of a term is wholly irrelevant when that term is defined.") (internal citation omitted).

This significantly undercuts petitioner's textual argument; at a minimum, it creates substantial ambiguity in the statutory scheme.

2. There is yet more significant and obvious tension between Subsection (a)(6)'s narrow definition and the broad anti-retaliation protection under Subdivision (iii). By its terms, Subdivision (iii) protects internal disclosures (such as those under Section 1514A), but does not limit that protection to those who also report to the SEC. See, *e.g.*, *Berman*, 801 F.3d at 147 ("the issue presented is whether the 'whistleblower' definition in [Section 78u-6(a)(6)] applies to subdivision (iii)," which "does not within its own terms limit its protection to those who report wrongdoing to the SEC"). "The statute's definition of 'whistleblower,' which requires a disclosure to the SEC, therefore exists in tension with subsection (iii) of the anti-retaliation provision, which protects a broad range of disclosures to entities other than the SEC." *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 729 (D. Neb. 2014). That tension has an easy resolution: when "the anti-retaliation provision is read using the word 'whistleblower' in its everyday sense, there is no such tension," and "all parts of the statute fit together into a harmonious and coherent whole." *Ibid.*

In response, petitioner argues that the provisions work together under its cramped view: the definitional section identifies *who* is protected, and the prohibition identifies actionable conduct *for the protected class*. Br. 16-17. Petitioner's view is a *possible* explanation, but not a *mandatory* explanation. It is possible that Congress meant to drastically limit subdivision (iii) with the definition section invoked *seven* subsections earlier. But it is also possible that the choice of words was a remnant from an earlier version of the Act, when the term "whistleblower" was inserted in Section 78u-6(h)(1)(A) *before* the

critical Subdivision (iii) was created. See Part I.C, *infra* (explaining the history of Dodd-Frank's passage). And it is further possible that Congress was simply using whistleblower in its idiomatic sense.

The important point, however, is that unless petitioner's view unambiguously forecloses any contrary interpretation of the statute, it cannot overcome the SEC's expert construction of the statute. These competing constructions present an obvious case of ambiguity.

3. Petitioner's reading is also out of step with the grammatical structure of the anti-retaliation prohibition. The provision's plain language is drafted as a *prohibition* directed to employers. It says what employers may *not* do, and outlines the "lawful act[s]" they may not punish, including internal reporting "required or protected" under Sarbanes-Oxley. The focus of the provision is thus on the wrongdoer, not the victim. It only mentions the victim—"a whistleblower"—indirectly as the target of the prohibited conduct. This would be a surprisingly backdoor way to impose such a serious limitation on the broad relief otherwise set forth in Subsection 78u-6(h)(1)(A).

Congress deliberately added a broad prohibition that protects internal reporting, and it is reasonable to presume this expansive protection was not included to provide minimal or no protection to any meaningful group under the Act: "In short, we disagree with petitioner's reading of the text of the Act and think it unreasonable to assume that Congress intended to enact such a truncated version of an important [securities] statute." *Holloway* v. *United States*, 526 U.S. 1, 12 (1999).

4. According to petitioner, the Act's structure supports its position. Br. 20-22 (explaining the Act's treatment of the incentive program and the anti-retaliation provision). This is wrong on multiple levels. First, the di-

vision between bounty awards and anti-retaliation protections supports *respondent*, not petitioner. The first part of the section provides awards but limits those awards to disclosures to the SEC. This is the obvious focus of the definition: the awards are tethered to agency actions, so the agency must receive the relevant information.

The second half provides protections against unlawful conduct. The focus there is prohibiting wrongful behavior, not rewarding SEC disclosures. If the focus were still limited to providing information to the SEC, the retaliation protection would be limited to SEC disclosures. The broader sweep of Subdivision (iii) corresponds with a broader focus in that provision. The clear tension between the definition in Subsection 78u-6(a)(6) and the protected conduct in Subdivision (iii) is readily resolved, again, by giving the subdivision its natural sweep and according whistleblower its natural meaning.

In response, petitioner asserts that Subdivision (iii) serves a different purpose: "By virtue of that clause, a whistleblower who reports alleged misconduct both to the SEC and to another entity has the same protection from retaliation—and thus the same incentive to report to the SEC—as a whistleblower who does not make the additional disclosure." Br. 22. This is a non-sequitur. Congress did not need to protect the *internal* disclosure to provide "the same incentive to report to the SEC"; Congress had to protect the internal disclosure *to provide the incentive to make the internal disclosure*. The incentive to report to the SEC was already secured by Subdivisions (i) and (ii)—full stop. The "gap" filled (Br. 22) by Subdivision (iii) was the need to protect those internal disclosures that are essential to the overall securities scheme and serve as a necessary predicate to substantial categories of external reporting.

5. As multiple courts have recognized, petitioner's reading arguably creates a surplusage problem in Subdivisions (i) and (ii). Those provisions specifically limit protection to disclosures made "to the Commission"—a concept already embedded in the statutory definition. Had Congress truly intended to limit the anti-retaliation provision to "whistleblowers" under Subsection (a)(6), it would have had no need to repeat that limiting language in those provisions. See, *e.g.*, *Berman*, 801 F.3d at 154 (explaining that the textual references to the SEC-disclosure requirement would debatably "be superfluous" under petitioner's construction).

In response, petitioner argues that those terms "clarify" the statutory scope, and Congress is not obligated to draft statutes using the fewest possible words. Br. 36. It is true that there is no principle requiring Congress to write economically. But when one construction creates unnecessary verbiage and another does not, there is at least some value in adopting the reading that gives meaning to each word.

Petitioner also overlooks a more fundamental point. The fact that Congress specifically invoked narrowing language ("to the Commission") in Subdivisions (i) and (ii) suggests that Congress did not view the term "whistleblower" as already imposing the same limitations. This at least suggests tension with the presumption that whistleblower was not used in its ordinary sense.[7]

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[7] According to *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), removing the SEC reporting requirement from Subdivision (iii) would "violate the surplusage canon" by "read[ing] the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." 720 F.3d at 628. This is wrong. That "definition" would still retain force in the broad-

6. According to petitioner, its view is supported by Congress's use of different language in Title 12's anti-retaliation provision regarding the Consumer Financial Protection Bureau (CFPB). Br. 23-24. Petitioner argues that this provision—12 U.S.C. 5567—phrased its protection in terms of a "covered employee," not a "whistleblower," and Congress would have employed a similar formulation if it had so wished in Section 78u-6. *Ibid.*

But Section 5567 covers a far broader set of conduct, including acts not commonly described as "whistleblowing": it prohibits, for example, retaliation for filing consumer-protection suits or even "refus[ing] to participate" in certain activities, even if the refusal was unaccompanied by any report to a supervisor or external entity. 12 U.S.C. 5567(a)(3), (4). The broader label was necessary to capture the broader set of conduct. Here, by contrast, the prohibited disclosures fit comfortably within the heartland of whistleblowing in its traditional sense.

In any event, Dodd-Frank spanned hundreds of pages and covered countless provisions on all manner of subjects. Congress may have considered the CFPB provision in crafting Section 78u-6, but it is far more likely that Congress considered the immediately cross-referenced provisions of Sarbanes-Oxley (Section 1514A) that describe internal reporters as "whistleblowers." If it was inspired to

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est sweep of the statute, including the key provisions limiting the universe of individuals eligible for incentive awards. See, *e.g.*, 15 U.S.C. 78u-6(b)(1). But as *Berman* explained, the question is not what the definitional section means, but rather whether it applies at all to subdivision (iii). 801 F.3d at 147; see also *Robinson*, 519 U.S. at 343 ("those examples at most demonstrate that the term 'employees' may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts"). In light of the statute's plain text, structure, and purpose, the answer is plainly no. Notably, petitioner does not even attempt to defend this aspect of the Fifth Circuit's decision.

use any terms, it likely took that inspiration based on the provisions more immediately relevant to its task at hand.

B. The SEC's Construction Of Subdivision (iii) Is Necessary To Promote And Protect Congress's Statutory Objectives And The Overall Regulatory Scheme

Petitioner's theory is irreconcilable with Dodd-Frank's legislative purpose. If adopted, it would render entirely insignificant a critical anti-retaliation safeguard, and do so in a way that would upset the proper operation of both Dodd-Frank and Sarbanes-Oxley—while leaving a puzzling and arbitrary cause of action in its wake. The expert agency rejected petitioner's position for a reason, and that expert view warrants respect.

1. Petitioner's view is incompatible with the overall statutory scheme. Sarbanes-Oxley's chief focus is on internal compliance and internal reporting. *E.g.*, Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 Harv. L. Rev. 1829, 1832 (2011); see, *e.g.*, 15 U.S.C. 7262. Yet a rule hinging protection exclusively on *external* reporting directly frustrates that statutory objective. It discourages the use of internal policing, and defeats the point of setting up "internal processes for investigating and responding to potential violations of the Federal securities laws." Securities and Exchange Commission, *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010). "Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances." Securities and Exchange Commission, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47829,

47830 (Aug. 10, 2015). Petitioner's competing interpretation, by contrast, "would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting." *Ibid.*[8]

The SEC properly recognized that Congress did not intend to create "a 'two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances.'" Pet. App. 42a. By directly frustrating Sarbanes-Oxley's key framework, petitioner's theory would create an incoherent statutory scheme. See, *e.g.*, *Utility Air*, 134 S. Ct. at 2442 (asking whether a construction is "incompatible * * * with th[e] programs' regulatory structure"); *Brown & Williamson*, 529 U.S. at 133 ("words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted).

2. Petitioner's view would not only cripple Sarbanes-Oxley's reliance on internal reporting, but also frustrate the practical operation of Dodd-Frank itself. Under federal law, internal reporting is often a *precondition* to external reporting. It makes a mockery of the overall regulatory scheme to suggest that internal reporting is required but will not be protected—even though internal reporting is required in the broadest swath of cases before any information can be disclosed to the SEC.

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[8] As noted earlier, the U.S. Chamber of Commerce participated in the rulemaking process, submitting a comment (together with other groups) underscoring "the important role that internal corporate programs have in promoting compliance with securities and other laws," and arguing that "preserving that role should be a policy touchstone in formulating rules to implement the Dodd-Frank whistleblower provisions." Stephanie Johnson, U.S. Chamber of Commerce, *Comment Letter* 3 (Dec. 17, 2010) <tinyurl.com/uschambercomments>.

The end result is that potential whistleblowers—even those willing to eventually disclose to the SEC—will be chilled before they can even start the progression to filing an external report. That is bad for both Sarbanes-Oxley and Dodd-Frank, and it is a strange intent to ascribe to a Congress determined to protect whistleblowers—lowercase "w"—from unlawful acts.

3. Petitioner's interpretation "would, in effect, all but read subdivision (iii) out of the statute." Pet. App. 8a. This Court has repeatedly rejected statutory readings that would render terms "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Yet petitioner's reading would "narrow[]" subdivision (iii) "to the point of absurdity." Pet. App. 8a. It would entirely cut out protections for lawyers and auditors—two key groups with essential roles in catching and stopping unlawful conduct. *Lawson*, 134 S. Ct. at 1170; *Berman*, 801 F.3d at 151 ("[T]here are categories of whistleblowers who cannot report wrongdoing to the Commission until after they have reported the wrongdoing to their employer. Chief among these are auditors and attorneys."). If an employee must report internally before having the option of reporting to the SEC, the employee is left without any meaningful protection at all—"that required preliminary step would result in early retaliation before the information could reach the regulators." Pet. App. 7a; see also *id.* at 8a ("Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. The anti-retaliation provision would do nothing to protect

these employees from immediate retaliation in response to their initial internal report.") (citation omitted).[9]

Given the critical roles occupied by lawyers and auditors under both Dodd-Frank and Sarbanes-Oxley, it is implausible that Congress intended to strip away their protections in such an indirect fashion. See, *e.g.*, *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1162, 1168 (2014).[10]

Even aside from those professionals, "although there may be some potential whistleblowers who will report wrongdoing simultaneously to their employer and the Commission, they are likely to be few in number." *Berman*, 801 F.3d at 151. Indeed, while *Asadi* imagined this hypothetical group to give subdivision (iii) some effect, 720 F.3d at 627-628, it failed to identify a single, real-world example fitting this unusual pattern.[11] "Thus, apart

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[9] Petitioner is correct that Congress is not *obligated* to extend protections to all classes of individuals. Br. 35. But the question is one of prudence, not power: it is exceptionally unlikely that Congress would have recognized the critical role played by accountants and lawyers and then silently excluded them, for all practical purposes, from Dodd-Frank's reach. Nor does it matter that some accountants or lawyers might report internally and externally without being terminated. That possibility is cold comfort to the professional who is forced to put her livelihood on the line to risk the unprotected internal report.

[10] It is true that lawyers and accountants (and any other group excluded by petitioner's reading) would still be able to take advantage of Sarbanes-Oxley's remedies under Section 1514A. But those remedies have proven ineffective for most claimants, and Congress felt an obvious need to provide a robust choice of remedies to ensure whistleblowers are protected. It would be passing strange to presume Congress granted a remedy—designed to improve disclosure—only to withdraw that remedy for key groups that otherwise play essential roles in ferreting out securities violations.

[11] See Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) ("The

from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope." *Berman*, 801 F.3d at 152 (footnote omitted); see also, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001) (asking whether a construction "would in practical effect render [an] exception entirely superfluous in all but the most unusual circumstances"); *Robinson*, 519 U.S. at 346.[12]

4. Petitioner's statutory construction also introduces a multitude of anomalies into the statutory scheme. First, it would create a wholly arbitrary form of protection: It leaves individuals unprotected who report internally *as part of a mandatory progression to reporting to the SEC.* Indeed, it would even leave individuals unprotected *who later report to the SEC.* That means that individuals would receive protection, or not, based on how quickly they fall victim to unlawful conduct. It would be highly unusual for Congress to withdraw protection from someone for faithfully discharging her duties to use mandatory internal channels before reporting to the SEC.

Second, despite prohibiting retaliation for specific disclosures, liability would attach entirely based on a *separate* disclosure to the SEC *that employers will typically have no idea actually occurred.* That means the identical misconduct will go punished or not based on the happenstance of a separate report, and the wrongdoer will not

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Fifth Circuit is also unable to point to any concrete examples of such a situation ever occurring.").

[12] Petitioner cites a small handful of examples of individuals who reported both internally and to the SEC. These isolated instances hardly provide any meaningful scope to this important statutory safeguard.

even be aware of the dispositive factor that activates or withdraws the protection. To say the least, that describes an incredibly unusual statutory scheme. It is not typical for Congress to identify wrongful conduct, declare that wrongful conduct "prohibited," and then hinge everything on a *separate* disclosure that has nothing to do with the wrongful act.[13]

This is a perplexing view to ascribe to Congress. It recognizes that Congress wanted to deter and punish retaliation for specific disclosures (those identified in Subdivision (iii)) but decided to leave *that exact misconduct* unpunished because an individual did not make some separate disclosure to the SEC. One would expect a clear statement before assuming Congress intended to embrace such a puzzling scheme.[14]

5. Petitioner, like the Fifth Circuit, maintains that the SEC's rule would render Sarbanes-Oxley's enforcement scheme "moot" because "no one would use it." Pet. App. 9a (describing *Asadi*, 720 F.3d at 628-629); Br. 28-29 (arguing that the Act's scheme will become "obsolete" because Dodd-Frank affords advantages that Sarbanes-Oxley does not). But this theory has been squarely refuted by the SEC, as "Sarbanes-Oxley may be more attractive

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[13] Petitioner's theory produces other odd and unworkable results. If a whistleblower reports once to the SEC, are they forever protected for all internal reports? Is there a time-limit? Is there a nexus requirement between the subjects disclosed to the SEC and the subjects disclosed internally? (Note the lack of any textual hook requiring that the disclosures are close in time or subject-matter.)

[14] Section 1514A is limited to retaliation by only certain organizations, while Subsection (h)(1)(A) covers *all* employers. This daylight reveals that some individuals, under petitioner's reading, will have no remedy if they face retaliation for filing an internal report. This would strangely leave retaliatory acts unpublished that Congress declared wrongful and prohibited.

to the whistleblowing employee" in numerous ways. Pet. App. 9a (describing the SEC's arguments).

First, while petitioner presumes that most parties wish to avoid administrative review, that is certainly not true for all parties. Under Sarbanes-Oxley, the agency "tak[es] responsibility for asserting the claim on the whistleblower's behalf," thus reducing "cost[s]" and "stress[]" for parties otherwise pursuing relief on their own in federal court. *Ibid.* Just as employers often prefer administrative review, employees may likewise prefer it for similar reasons.

Second, while Dodd-Frank does authorize double backpay, see 15 U.S.C. 78u-6(h)(1)(C), Sarbanes-Oxley authorizes "all relief necessary to make the employee whole," including "compensation for any special damages," 18 U.S.C. 1514A(c)(1), (2)(C) (also protecting against pre-dispute arbitration agreements). See Pet. App. 9a-10a (citing *Jones* v. *SouthPeak Interactive Corp.*, 777 F3d 658, 672 (4th Cir. 2015)). Although some employees will favor double backpay, "[a]n employee who has suffered more substantial emotional injury than financial harm would likely be better off with Sarbanes-Oxley's allowance for special damages." Pet. App. 9a-10a.

In the end, it makes little sense to presume, as petitioner does, that Congress would have created a powerful new anti-retaliation remedy, but withheld that remedy to all those who faithfully discharge their statutory, regulatory, and corporate duties to report via internal channels—thus leaving those employees completely unprotected during the periods before disclosure to the SEC is even possible.[15]

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[15] Petitioner faults the SEC for picking and choosing elements of the statutory definition, suggesting the agency invented out of whole

C. The Legislative History Reaffirms That Congress Expanded Subdivision (iii) To Protect Internal Reporting

1. Contrary to petitioner's contention (Br. 24-26), the legislative history supports the SEC's interpretation. While the congressional record is limited, this provision was added at the last minute by the Conference Committee in reconciling the House and Senate versions of Dodd-Frank. *Berman*, 801 F.3d at 152-153 & n.8. It takes little imagination to understand what happened: "When conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages, and someone succeeds in inserting a new provision like subdivision (iii) into subsection 21F(h)(1)(A), it is not at all surprising that no one noticed that the new subdivision and the definition of 'whistleblower' do not fit together neatly." *Id.* at 154.

This is a provision designed to protect a vulnerable class and deter unlawful conduct. It is "doubtful that the conferees who accepted the last-minute insertion of subdivision (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in [subsection (a)]." *Berman*, 801 F.3d at 155; see also *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) ("we have explained that the statute

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cloth the securities-nexus. Br. 34. Petitioner misreads the SEC's regulation, which textually includes any disclosures protected by Section 1514A; it accordingly does *not* have an artificial limitation. As for petitioner's far-fetched hypotheticals about employees being fired for reporting on drug-dealing colleagues, suffice it to say that the Court has already refused to distort the natural reading of a statute based on similar possibilities (see *Lawson*, 134 S. Ct. at 1168 (rejecting hypos based on gardeners and housekeepers)), and it is unusual to find fault in a scheme that captures mail fraud—where Sarbanes-Oxley itself captures mail fraud. (Corporations, in any event, benefit from ferreting out *any* illegal activity occurring under the company roof.)

should be 'construed "not technically and restrictively, but flexibly to effectuate its remedial purposes"'").

In response, petitioner says that Congress "intended for whistleblowing employees—who face heightened risks when they report their employers' misconduct to the SEC—to have heightened protection against retaliation under the Dodd-Frank Act." Br. 25. That explanation might explain Subdivisions (i) and (ii)—both of which concern reports to the SEC—but it does not explain Subdivision (iii)'s expansive protection for disclosures "required or protected" by other laws. 15 U.S.C. 78u-6(h)(A)(1)(iii). A simpler explanation exists: Congress intended to protect disclosures—*required or protected by other laws.*

Moreover, that purpose is consistent with getting information to the SEC: Because many groups are required to report internally, providing protection for that internal reporting advances the mandatory progression for information ultimately to reach the SEC. This protection thus twice advances Congress's objectives: it secures the integrity of the overall regime's focus on internal reporting, and it promotes the use of internal channels that otherwise stand in the way of external reporting.

2. According to petitioner, the legislative history supports its narrow view of the statute. As petitioner notes, the bill that originated in the House covered "employee[s], contractor[s], or agent[s]," and the Senate later "narrowed the [anti-retaliation] provision to cover only 'whistleblowers,' and Congress enacted the narrower version." Br. 25-26. Petitioner thus argues that the SEC's reading improperly tries to "restore the discarded statutory language." Br. 26.

Petitioner's argument suffers from a logical flaw. At the time of the Senate's amendment, *both* versions—House and Senate—were limited *to protecting disclo-*

sures to the SEC. Thus the change in language did absolutely nothing to modify the scope of the statute: it protected the same class later defined as "whistleblowers" both before and after the (stylistic) change.

Had the Senate replaced the House's version ("employee, contractor, or agent") at the same time Subdivision (iii) was added, then petitioner's argument would have greater purchase. But the existing chronology actually cuts *against* it: The very fact that the definition made sense *at the time it was drafted* suggests it was not a deliberate choice to limit the scope of a provision *that did not yet exist.* The far more likely explanation, looking to the real world, is that Congress failed to reconcile the important new protection in Subdivision (iii) with the *preexisting* language because it was focused on the new addition.[16]

3. Petitioner further overstates the significance of commentary in the legislative record, which predominantly focused on channeling information to the SEC. Br. 24. None of these statements addressed the proper scope of Subdivision (iii) because *none were made after Subdivision (iii) was added to the provision.* It is little surprise that Congress did not acknowledge the section's expanded scope before it was actually expanded.

II. PETITIONER'S APA PROCEDURAL CHALLENGES ARE BOTH MERITLESS AND NOT PROPERLY PRESENTED

As an alternative attack on the decision below, petitioner contends that, even if the SEC reasonably construed the statutory text, its interpretation nonetheless

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[16] At that time, the definition applied to restrict the SEC incentive program to those providing information to the SEC, and it matched the initial, narrow scope of the anti-retaliation protection. See, *e.g.*, *Berman*, 801 F.3d at 152-153 & n.8

does not warrant deference because its rule is procedurally defective. Br. 41-44. This challenge fails on multiple levels. First, the Court should not consider this issue because petitioner did not raise it below or in its certiorari petition. Indeed, we have not found *any* court that has addressed these procedural arguments. Second, Rule 21F-2 survives because the procedural attacks are time-barred and substantively baseless. Third, regardless, the SEC's construction of the statute constitutes an interpretive rule that warrants *Chevron* deference even without any notice-and comment rulemaking.

A. The Court Should Not Consider Petitioner's New Procedural Challenges

Petitioner claims that Rule 21F-2 is procedurally invalid because it was not a "logical outgrowth" of the SEC's notice of proposed rulemaking and lacks an adequate explanation. Petitioner did not raise these challenges below, the lower courts did not mention them, and this Court should not consider them.

1. The Court generally refuses to consider "'questions not raised or resolved in the lower court[s].'" *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (alteration in original) (citation omitted). "Although in some instances [the Court] ha[s] allowed a respondent to *defend* a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petition to assert new substantive arguments *attacking*, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (emphases added) (citation omitted).

Petitioner is attempting to do just that. Its primary (and previous) attacks were *substantive* challenges; this new approach is wholly *procedural*. It did not raise this

procedural issue in the Ninth Circuit (or the district court), and neither court addressed it. These procedural questions are wholly distinct from the issues that were raised and resolved. The issue petitioner litigated below turns on the statutory text and all the usual tools of statutory construction. Petitioner's procedural challenges, by contrast, depend on the intricacies of the rulemaking process independent of the statute's meaning, and would require the Court to address a host of sub-arguments to resolve the rule's procedural validity and *Chevron*'s applicability.

The Court should therefore adhere to its normal practice—even stronger where the new argument is one *attacking* the judgment under review—and decline to address these contentions. See, *e.g.*, *Chaidez* v. *United States*, 568 U.S. 342, 357 n.16 (2010) (while considering a *Teague* retroactivity analysis, refusing to consider petitioner's "back-up arguments" that *Teague* did not even apply, because they were made for the first time in the petitioner's opening brief).

2. For similar reasons, petitioner's procedural attacks are not "fairly included" within the question presented. Sup. Ct. R. 14.1(a). These issues were not even hinted at in petitioner's certiorari petition, and they pose considerations entirely separate from the statute's meaning. While they "may be '*related*'" or "'*complementary*'" to the question presented, "they are 'not fairly included therein.'" *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation omitted) (emphasis in original); see also, *e.g.*, *S.F. Arts & Athletics, Inc.* v. *U.S. Olympic Committee*, 483 U.S. 522, 547 n.30 (1987) (holding that the petitioner's "new theory of governmental action is not fairly encompassed within the questions presented and thus is not properly before the Court").

3. Even had petitioner pressed its procedural arguments below and properly included them within the question presented, the Court should still decline to consider them. This Court has repeatedly reminded litigants that it is "'a court of review, not of first view.'" *Chaidez*, 568 U.S. at 357 n.16 (citation omitted); see, *e.g.*, *McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017). Yet not only was the rule's procedural validity unexamined below, we have been unable to locate any decision (at any level) resolving petitioner's procedural challenges. Petitioner accordingly asks this Court to be the very first to sift through the notice of proposed rulemaking and administrative record, without any guidance from lower courts or the usual benefit of the adversarial process. The Court should decline that request. See *Chaidez*, 568 U.S. at 357 n.16 (declining to consider petitioner's argument in part because "we cannot find any case in which a federal court has considered" it).

B. In Any Event, Petitioner's Procedural Attacks Are Meritless

If the Court considers these new contentions, it should reject them for multiple reasons.

1. As an initial matter, both procedural attacks are time-barred. Cf. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule.") (citing *JEM Broadcasting Co.* v. *FCC*, 22 F.3d 320, 324-326 (D.C. Cir. 1994)). At the latest, procedural challenges under the APA "must be brought within six years of the agency rulemaking." *Perez-Guzman* v. *Lynch*, 835 F.3d 1066, 1077 (9th Cir. 2016); see also, *e.g.*, *Sai Kwan Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009); 28 U.S.C. 2401(a). The SEC promulgated its whistleblowing rule on June 13, 2011. Petitioner first challenged the rule's procedural validity more than

six years later, in its opening merits brief filed August 24, 2017. There is every reason not to reopen a stale administrative record after a rule has fairly governed regulated entities for over half a decade.

It is no matter that these attacks are not part of a standalone action under the APA. A party may "not 'do indirectly what it is forbidden by statute from doing directly'" and "seek[] a back door" to judicial review of the agency's procedures by asserting procedural invalidity as a defense. *JEM Broadcasting*, 22 F.3d at 324; see *id.* at 325-326. Petitioner should have (and could have) challenged the SEC's procedures earlier. Its failure to do so precludes its attacks now.

2. Regardless, each challenge fails on its merits.

a. Contrary to petitioner's assertion, the SEC's final rule *was* a "logical outgrowth" of the rulemaking notice. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007). "The object, in short, is one of fair notice." *Ibid.* A notice suffices if it provides the "substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b). Consistent with that modest requirement, "'[t]he notice need not specifically identify every precise proposal' that '"may ultimately [be] adopt[ed]."' *United Steelworkers of Am., AFL-CIO-CLC* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 317 (5th Cir. 1987) (citation omitted); accord *Am. Med. Ass'n* v. *United States*, 887 F.2d 760, 767-769 (7th Cir. 1989).

Parties do not have a right to comment "upon each application of the agency's announced rulemaking procedures, even if different applications may have significant consequences for the regulated industry," so long as the notice was "adequate." *Am. Coke & Coal Chems. Institute* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). Rather, an agency must undergo another round of notice-and-com-

ment only when "'the changes are so major that the original notice did not adequately frame the subjects for discussion.'" *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 631-632 (D.C. Cir. 1996) (citation omitted). Under these standards, courts have upheld final rules that effected "outright reversal of the agency's initial position; elimination of compliance options"; and "exempting certain entities from the overage of final rules." *Am. Med. Ass'n*, 887 F.2d at 767 (citing cases).

The SEC's notice readily described "the subjects and issues involved" (5 U.S.C. 553(b)) so that parties had fair notice the SEC would interpret Section 78u-6 as protecting internal whistleblowers. Petitioner's myopic reading of the notice ignores large swaths of the SEC's reasoning and requests for comment, and demands a level of specificity that Section 553(b) does not.

A primary focus of the rulemaking was how to promote internal reporting while still fulfilling the purposes of the whistleblowing statute. See, *e.g.*, 76 Fed. Reg. at 34,300-34,301. For instance, the notice specifically worried about "sufficient incentives for people to continue to utilize internal compliance processes" while requesting comments on "alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F." 75 Fed. Reg. at 70,495; see *id.* at 70,496 ("we also want to implement Section 21F in a way that encourages strong company compliance programs"; "we request comment on all aspects of

the intersection between Section 21F and established internal systems" of reporting).[17]

One obvious difficulty with balancing those goals is that an employee might fear retaliation if she reports internally—and accordingly would be less likely to do so. See, *e.g.*, 76 Fed. Reg. at 34,324 & n.217 (noting comments that internal reporting "[p]laces whistleblowers at risk of retaliation"). An obvious solution is to protect internal reporters from retaliation. That "outgrowth" was not merely "logical," but *necessary*. It would have been senseless for the SEC to go to such lengths to encourage internal reporting—exactly as so many comments vigorously recommended—only to undercut that objective by allowing companies to freely retaliate against internal reporters. The retaliation protections thus work hand-in-hand with promoting companies' internal-compliance programs, and parties easily could have "'anticipated'" this outcome. *Am. Coke*, 452 F.3d at 938; cf. *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) ("The instant notice left no doubt that EPA would consider all reasonable alternatives for cutting down vehicle use.").

The comments bear this out. See *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699 (D.C.

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[17] See also, *e.g.*, *id.* at 70,491 ("Should the class of persons who are covered by this rule be narrowed or expanded?"), 70,493 (discouraging individuals from "circumvent[ing] or undermin[ing] the proper operation of the entity's internal processes for responding to violations of law"), 70,496 ("Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?"), 70,511 ("Should the application of the anti-retaliation provisions be limited or broadened in any other ways?"), 70,514 (noting concern about "effectiveness of internal compliance programs"), 70,490 n.10 (noting "inten[t] to facilitate the operation of company compliance processes, audits, and internal investigations").

Cir. 2008) (explaining that "the comments, statements and proposals made during the notice-and-comment period" can show that the final rule satisfies Section 553(b)). Commenters recognized this issue in urging the final rule to afford anti-retaliation protection to internal reporters. For example, the District of Columbia Bar explained that "expand[ing] the anti-retaliation protections to apply to internal programs" would "enhance the effectiveness" of those programs, and Section 78u-6(h)(1)(A)(iii) "allows the Commission to" do so. Comment Letter 4, D.C. Bar (Dec. 17, 2010).[18] Another comment likewise acknowledged the SEC's concern about effective internal-reporting programs, and argued that "[i]nternal and external whistleblowing should receive protection and encouragement." Comment Letter 4, National Whistleblower Center (Dec. 17, 2010).[19] And multiple corporations (including Microsoft, Merck, Procter & Gamble, and Hewlett-Packard) proposed that, consistent with their advocacy for internal-reporting requirements, "[a] whistleblower who submits a good-faith report through an internal compliance program * * * should be entitled to the protection of the anti-retaliation provisions of Section 21F, beginning at the time of submission." Comment Letter 13 (Dec. 17, 2010).[20] These comments show that the notice adequately apprised parties of "the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b).

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[18] Available at https://www.sec.gov/comments/s7-33-10/s73310-146.pdf.

[19] Available at https://www.sec.gov/comments/s7-33-10/s73310-210.pdf.

[20] Available at https://www.sec.gov/comments/s7-33-10/s73310-150.pdf.

The SEC therefore had no obligation (or reason) to solicit more comments on the whistleblower definition, particularly given the congressional directive to promulgate rules "not later than 270 days after July 21, 2010." 15 U.S.C. 78u-7(a). "[T]he 'public interest in expedition and finality' in this case outweighed the advantages of additional comment." *Omnipoint*, 78 F.3d at 632. It is unsurprising that no court has had occasion to address this "logical outgrowth" objection—no party, until now, apparently considered the argument sufficiently viable to trot it out for decision.

b. Petitioner's contention that "the SEC did not adequately explain" its reasoning similarly ignores part of the SEC's discussion and the wider context of promoting internal reporting. This Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). As multiple commenters appreciated, one transparent way to remove a disincentive to internal reporting is to protect such reporting. As the SEC noted in a portion of the final rule elided by petitioner, Rule 21F-4 "create[s] a significant financial incentive for whistleblowers to report possible violations to internal compliance programs," and "[e]mployees who report internally in this manner will have anti-retaliation employment protection." 76 Fed. Reg. at 34,325 & n.223.

Together with the agency's sensible construction of ambiguous text and the plain connection between internal reporting and robust anti-retaliation protections, that "reasonable, albeit brief, explanation" satisfies this lenient standard. *Long Island Care*, 551 U.S. at 175; see also, *e.g.*, *Global Crossing Telecommc'ns, Inc.* v. *Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 63-64 (2007) (concluding

that the administrative decision's "history" and "context" made "the FCC's rationale obvious").[21]

c. In addition, the APA mandates that, in considering these challenges, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki* v. *Sanders*, 556 U.S. 396, 409 (2009). Yet petitioner has not even attempted to make that showing. Indeed, remand here would be pointless. All petitioner's arguments attacking the SEC's interpretation of Section 78u-6 have been well-vetted for years, and the SEC has firmly disagreed. "As Judge Friendly explained, reversal and remand is 'necessary only when the reviewing court concluded that there is a significant chance that but for the error the agency might have reached a different result.'" *Envirocare of Utah, Inc.* v. *Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999). It is inconceivable that if the Court were to vacate the rule and remand for another round of comments, the SEC would reverse course.

C. The SEC's Two Independent Clarifications Of Section 78u-6 Warrant *Chevron* Deference With Or Without Notice-And-Comment Procedures

Even if petitioner is correct that the notice-and-comment process was defective, that would not strip the SEC's interpretation of *Chevron* deference. Both Rule 21F-2 and the subsequent 2015 interpretative guidance are valid interpretative rules entitled to *Chevron* deference without *any* notice-and-comment process.

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[21] As noted above, the D.C. Bar, in a comment cited multiple times throughout the final rule, explicitly identified Subdivision (iii) as providing authority for the SEC to protect internal reporters.

1. The SEC did not need to use notice-and-comment procedures merely to construe Section 78u-6, because interpretive rules are exempt from those requirements. See 5 U.S.C. 553(b)(A). "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted). The rule "must 'derive a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document.'" *Cent. Tex. Tel. Co-op, Inc.* v. *FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005). Although both interpretive and substantive rules may "alter[] primary conduct," *id.* at 214, "the crucial distinction" between the two "is that a substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*," *Syncor Int'l Corp.* v. *Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997); see *id.* at 94 (even though an interpretive rule may represent, "in reality, a change in the legal norm," the agency is not "exercising authority to itself make positive law"); *Miller* v. *Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) ("A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules.").

Simply resolving a statutory ambiguity—as the SEC's authoritative interpretation of "whistleblower" did here—represents a paradigmatic interpretive rule. See, *e.g.*, *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Miller*, 536 F.3d at 1033 ("the purpose of an interpretive rule" is to "clarif[y]" an ambiguous term); *Warder* v. *Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) (ambiguous "definitions created the need for clarification—precisely the

function of an interpretative rule"). Petitioner's procedural challenges are thus wholly beside the point.[22]

2. In any event, the SEC's subsequent 2015 interpretive guidance—itself a valid interpretive rule—warrants deference. *Chevron* "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002); see, *e.g.*, *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002). Rather, multiple factors support applying the *Chevron* framework: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222.

The 2015 interpretive guidance checks all those boxes. Congress has expressly instructed the SEC to administer Dodd-Frank's intricate administrative scheme, and the SEC exercised that authority to clarify an ambiguity that impeded the effective functioning of that scheme. While petitioner obviously disagrees with the SEC's conclusion, it can hardly quibble that the SEC has carefully considered the matter. *Chevron* thus "provides 'the appropriate legal lens through which to view the legality of'" the SEC's 2015 guidance, despite the absence of notice-and-comment rulemaking. *Cal. Valley Miwork Tribe* v. *United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (quoting *Barnhart*, 535 U.S. at 222); see also, *e.g.*, *Kruse* v. *Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59-61 (2d Cir. 2004); *Schuetz* v. *Banc One Mortg. Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002).

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[22] As discussed *infra*, this interpretive rule would warrant *Chevron* deference.

The SEC correctly read Congress's critical expansion of whistleblower protection in Dodd-Frank, and its formal rule should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Section 922(a) of the Dodd-Frank Act defines "whistleblower," for purposes of "this section," as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." Ignoring that plain language, respondent contends that "whistleblower" has *two* definitions in Section 922(a): the actual statutory definition, which applies only for purposes of the section's award provision, and a second "ordinary sense" definition, which applies for purposes of the section's anti-retaliation provision. According to respondent, the first requires reporting to the SEC, and the second does not.

Respondent makes no serious effort to defend the court of appeals' conclusion that his is the correct textual interpretation of Section 922(a). Instead, from the very first sentence of his summary, he contends that "[t]his is a *Chevron* case." Br. 17. But an agency is not entitled to deference when its interpretation is contrary to the unambiguous language of the underlying statute.

This may be a *Chevron* case, then, but it is a *Chevron* step-one case. And at step one, the question is not close. Section 922(a) does two things: it creates a reward program to encourage individuals to report securities-law violations to the SEC, and it protects those same individuals from retaliation. The statutory definition of "whistleblower" unambiguously applies throughout "this section" to achieve Congress's goal of promoting reporting to the SEC.

There is nothing absurd about giving effect to the statutory text. Respondent contends that the SEC's contrary interpretation better "advances Congress's objectives," Br. 17, and comports with the sobering "realities of lawmaking," Br. 20. But that is insufficient to justify deference in the face of such plain text even under the most steroidal understanding of *Chevron*—especially given the existing protections under the Sarbanes-Oxley Act for employees who report internally.

For its part, the government, perhaps recognizing the defects in the SEC's rule, devotes almost its entire brief to arguing that this is *not* a *Chevron* case, on the theory that its interpretation is compelled by the text of the statute. See U.S. Br. 14-32. In the government's view, when Congress said that the definition of "whistleblower" "shall apply" "[i]n this section," 15 U.S.C. 78u-6(a), it unambiguously meant that the definition shall apply in some subsections of "this section," but not the one at issue in this case. That is a preposterous interpretation of which Humpty

Dumpty would be proud. And it rests on a misleading rendition of the legislative history.

All the Court need do in this case is to reaffirm the familiar principle that, where the language of a statute is plain and does not produce absurd results, the plain language should be given effect. Because the Ninth Circuit deviated from that principle, its judgment should be reversed.

A. The Dodd-Frank Act Unambiguously Requires Reporting A Securities-Law Violation To The SEC

Section 922(a) of the Dodd-Frank Act defines a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). That definition, Congress instructed, "*shall* apply" "[i]n this section." 15 U.S.C. 78u-6(a) (emphasis added). "[T]his section" indisputably includes the Act's anti-retaliation provision, which prohibits retaliation against "whistleblower[s]." 15 U.S.C. 78u-6(h)(1)(A). The plain text of the Dodd-Frank Act thus extends anti-retaliation protection only to a particular category of defined individuals: "whistleblowers."

Respondent acknowledges that the Court ordinarily must apply definitional provisions according to their terms. See Br. 25. He nevertheless contends that this is one of the "admittedly rare" cases where the Court should deviate from an unambiguous statutory definition. *Ibid.* That contention lacks merit.

1. A Court Must Apply An Unambiguous Statutory Definition, Like Any Other Unambiguous Statutory Provision, Unless Doing So Would Produce Absurd Results

a. A court construing a statute "must follow" an explicit statutory definition, "even if it varies from th[e]

term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000); see *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935). It is "axiomatic," moreover, that "the statutory definition of [a] term excludes unstated meanings." *Meese* v. *Keene*, 481 U.S. 465, 484 (1987). To be sure, a court may depart from that "virtually conclusive" axiom in "very rare" circumstances. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012) (Scalia & Garner). As with other unambiguous statutory language, however, a court may refuse to apply an unambiguous statutory definition only where its application would produce absurd results.

b. The cases respondent cites prove the point. For example, in *Lawson* v. *Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949), the Court considered whether the definition of "disability" in the Longshoremen's and Harbor Workers' Compensation Act should apply to a provision stating that, "[i]f an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury." *Id.* at 200 (citation and footnote omitted). The Act defined "disability" as "incapacity because of injury," and it defined "injury" as "accidental injury or death *arising out of and in the course of employment*." *Ibid.* (emphasis added; citation omitted). Applying that definition would have led to an "obvious incongruit[y]": the employer would have been liable for the *entire* disability if the previous disability had occurred while the employee was *not* on the job, thus defeating the Act's goal of preventing employers from discriminating against individuals with existing disabilities. *Id.* at 201.

Philko Aviation, Inc. v. *Shacket*, 462 U.S. 406 (1983), is of a piece. There, the Court considered whether to apply the statutory definition of "conveyance" in the Federal Aviation Act. See *id.* at 411-412. By its terms, that definition was "expressly not applicable 'if the context otherwise require[d].'" *Ibid.* (citation omitted). Another provision of the Act stated that "[n]o conveyance or instrument" would be valid "against any person * * * until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation." *Id.* at 409 (citation omitted). The Court observed that, if it applied the statutory definition of "conveyance" literally, the Act "would not require every transfer to be documented and recorded; it would only invalidate unrecorded title *instruments*, rather than unrecorded title *transfers*." *Ibid.* That would be absurd, given Congress's expressly stated intent to require "the recordation of every transfer * * * of any interest in a civil aircraft." *Id.* at 410 (internal quotation marks and citation omitted).

So too in *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014). There, the Court construed the Clean Air Act, which required major emitters of "air pollutants" to acquire certain permits. *Id.* at 2439. The Act defined "air pollutant" as "any air pollution agent or combination of such agents, including any * * * substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). In *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), the Court had construed the definition of "air pollutant" to "embrace[] all airborne compounds of whatever stripe." *Id.* at 529. Based on that broad definition, the Environmental Protection Agency argued in *Utility Air* that major emitters of greenhouse gases had to obtain the permits required for major emitters of air pollutants. See 134 S. Ct. at 2439.

This Court rejected that argument. It explained that applying the *Massachusetts* construction of "air pollutant" throughout the statute was "obviously untenable." 134 S. Ct. at 2439. EPA had applied narrower definitions of "air pollutant" in various specific contexts since the 1970s, and "*Massachusetts* did not invalidate all these longstanding constructions." *Id.* at 2439-2441. For example, EPA's interpretation of the statute would have required "an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances." *Id.* at 2440. Avoiding such absurdity, the Court explained that the Act-wide definition of "air pollutant" was "not a command to regulate, but a description of the universe of substances EPA may *consider* regulating under the Act's operative provisions." *Id.* at 2441.

These cases illustrate the problem with respondent's approach here. The rule that a court must apply a statutory definition according to its terms is more than a thumb on the scale; it is a binding "axiom[]," except in the unusual situation in which applying the plain text would be absurd. See *Keene*, 481 U.S. at 484. That is particularly true where (as here) not just the definition, but also the reach of that definition, is unambiguous: the definitional provision commands that its definitions "*shall* apply" "[i]n this section." 15 U.S.C. 78u-6(a) (emphasis added). Such mandatory language is "normally * * * impervious to judicial discretion." *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

2. *The Plain-Text Interpretation Does Not Produce Absurd Results*

Respondent cannot show that applying the statutory definition of "whistleblower" to the anti-retaliation provi-

sion would lead to absurdity. To the contrary, only petitioner's interpretation is faithful to the structure and history of the Dodd-Frank Act.

a. As a preliminary matter, respondent does not contend that applying the statutory definition of "whistleblower" would "contradict another provision" of the Dodd-Frank Act, thus requiring the Court to harmonize those provisions. Scalia & Garner 228. At most, respondent cites the supposed "tension" between the "whistleblower" definition and the third clause of the anti-retaliation provision. The former, he observes, requires the reporting of a securities-law violation to the SEC; the latter prohibits retaliation because of "disclosures that are required or protected" under the Sarbanes-Oxley Act and other laws, without requiring reporting to the SEC. 15 U.S.C. 78u-6(h)(1)(A)(iii). According to respondent, the differences between those two provisions produce "tension" that gives rise to statutory ambiguity. See Br. 28-30.

This Court's decision in *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), which petitioner discussed at length in its opening brief, gives the lie to that argument. There, the Court construed a provision of the Bankruptcy Code that gave enumerated persons—"a trustee, an examiner, [or] a professional person employed under section 327 or 1103"—the right to "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." *Id.* at 530 (quoting 11 U.S.C. 330(a)(1)).

The petitioner in *Lamie*, like respondent here, argued that the statute was ambiguous because of a tension between the individuals the statute covered and the right the statute afforded. See 540 U.S. at 535. But the Court dis-

agreed, noting that the first provision at issue "authorize[d] an award of compensation to one of three types of persons" and the second "define[d] what type of compensation may be awarded." *Id.* at 534. The type of compensation awarded, the Court explained, was "irrelevant" to the threshold question of which individuals were covered. See *ibid.*

That logic applies equally here. The anti-retaliation provision identifies a particular type of individual entitled to protection, a "whistleblower." See 15 U.S.C. 78u-6(h)(1)(A). It then protects a whistleblower from retaliation that occurs because of certain types of conduct by the whistleblower. See *ibid.* But unless an individual falls within the protected class in the first place—namely, "whistleblower[s]"—the type of protection afforded is "irrelevant." See *Lamie*, 540 U.S. at 534.

Remarkably, respondent ignores *Lamie* altogether. The government does little better, attempting to distinguish *Lamie* in a footnote on the formalistic ground that it did not involve an explicit statutory definition. See U.S. Br. 27 n.13. But that is a distinction without a difference: *Lamie* is on point because it illustrates how the Court should analyze a provision *structured* like the anti-retaliation provision. On that point, neither respondent nor the government has anything to say.

b. Respondent fails to identify any substantial anomalies that would result from the plain-text interpretation of the anti-retaliation provision.

i. Tracking the court of appeals, respondent first contends that applying the statutory definition of "whistleblower" to the anti-retaliation provision would render the third clause of the provision absurdly narrow, because it would apply only when an individual reported both to the SEC and internally (or to another entity). See Br. 35-37. Even if respondent is correct and the provision has

only "modest" "effect[s]" under that interpretation, however, it hardly renders the interpretation absurd. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). An interpretation is absurd only if it results in statutory language having "*no* operative effect." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (emphasis added).

For its part, the government hypothesizes that cases in which an individual reports both to the SEC and internally (or to another entity) "are likely to be few in number." U.S. Br. 23 (internal quotation marks and citation omitted). But even if that hypothesis were true (and the government offers no empirical support for it), a statute that protects even a "few" individuals still has "operative effect." *Duncan*, 533 U.S. at 174. This Court's role is to "apply the text," not to "improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

ii. In a related vein, respondent asserts that petitioner's interpretation is absurd because it "would entirely cut out protections for lawyers and auditors," who, he contends, must typically report internally before reporting to the SEC. Br. 35. But there is no evidence in the text or history of the Dodd-Frank Act that Congress had lawyers and auditors in mind when it enacted the anti-retaliation provision. See Pet. Br. 34. By contrast, the Congress that enacted the Sarbanes-Oxley Act was focused specifically on lawyers, auditors, and other employees of outside companies, as this Court has recognized. See *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169-1170 (2014).

Respondent thus overreaches when he asserts that the Dodd-Frank Act "strip[s] away" whistleblower protections for lawyers and auditors. Br. 36. As respondent concedes in a footnote, "lawyers and accountants * * * would still be able to take advantage of Sarbanes-Oxley's

remedies under Section 1514A." *Id.* at 36 n.10. Respondent asserts, again without empirical support, that "those remedies have proven ineffective." *Ibid.* But fewer than two pages later, in an effort to explain why his interpretation does not render the Sarbanes-Oxley Act's anti-retaliation protection effectively obsolete, he argues that the Sarbanes-Oxley Act's remedies "may be more attractive" than those available under the Dodd-Frank Act. *Id.* at 38-39 (citation omitted).

Respondent cannot have it both ways. Whatever the relative merits of the Sarbanes-Oxley Act's remedy, the continuing availability of that remedy underscores that interpreting the Dodd-Frank Act's anti-retaliation provision not to reach certain lawyers and auditors would not be "so bizarre that Congress could not have intended it." *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 347 (1994) (internal quotation marks and citation omitted).

iii. Respondent next contends that, under the plain-text interpretation, whether an individual has a remedy under the anti-retaliation provision will depend on when the individual suffers retaliation, and that employers committing retaliatory acts will not necessarily know that employees have a cause of action under the anti-retaliation provision. See Br. 37-38. The government similarly contends that two individuals who make the same internal disclosure will have different remedies if one reports to the SEC but the other does not. See U.S. Br. 24.

Those observations are correct—and that is precisely what Congress intended. As this Court has explained, the purpose of the Dodd-Frank Act was to incentivize "reporting to federal authorities." *Lawson*, 134 S. Ct. at 1175. Given the substantial evidence that Congress intended to protect employees who report their employers'

misconduct to the SEC, see Pet. Br. 24-26, there is nothing out of the ordinary, much less absurd, about conditioning the availability of the anti-retaliation remedy on such reporting—regardless of whether an employer is aware of the reporting at the time of the retaliatory act.

In a related vein, respondent and the government contend that the plain-text interpretation would lead to odd outcomes because the whistleblower provisions do not specify a substantive or temporal connection between the report to the SEC that qualifies an individual as a "whistleblower" and the disclosure that triggers the retaliation underlying the individual's claim. Specifically, the disclosure protected under the third clause of the anti-retaliation provision need not relate to the securities laws, as long as the whistleblower has made a separate report of a securities-law violation to the SEC. See Br. 38 n.13; U.S. Br. 25-26.

Again, those contentions are valid—but there is no resulting absurdity that would justify ignoring Congress's unambiguous command to apply the "whistleblower" definition "[i]n this section." Congress could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures. That would be consistent with the Act's broader goal of promoting reporting to the SEC.

In any event, respondent's alternative interpretation leads to a far more substantial oddity. Under that interpretation, an individual can have a cause of action under the anti-retaliation provision solely for making a disclosure that bears no relation to the securities laws. Consider, for instance, petitioner's hypotheticals involving employees fired for reporting drug dealing to the Federal Bureau of Investigation or mail fraud to a supervisor. See Pet. Br. 38. Other than calling those hypotheticals "far-

fetched," Br. 40 n.15, respondent offers no answer to them. Nor does respondent offer any reason to believe that Congress thought it was enacting a whistleblower provision for conduct unrelated to the securities laws when it enacted the Dodd-Frank Act.

Indeed, the SEC's rule underscores the absurdity of respondent's interpretation. In an evident effort to eliminate that absurdity, the SEC retained a remnant of the requirement from the "whistleblower" definition that the reported misconduct relate to a "violation of the securities laws" at the same time that it (impermissibly) dispensed with the remainder of the statutory definition. See 17 C.F.R. 240.21F-2(b)(1)(i). The plain-text interpretation is superior to respondent's because it requires at least some nexus to a securities-law violation without any of the jujutsu of the SEC's rule.

c. Respondent's and the government's remaining textual criticisms of the plain-text interpretation lack merit and certainly do not give rise to absurdity.

The government contends that, because the *other* defined terms in Section 78u-6(a) do not appear in the anti-retaliation provision, the definition of "whistleblower" should not be applied to that provision either. See U.S. Br. 19-20. But that is an extremely dubious inference. It is directly contrary to Congress's command that the "whistleblower" definition "shall apply" "[i]n this section." 15 U.S.C. 78u-6(a). And it overlooks the fact that Congress expressly cross-referenced the anti-retaliation regime in the definitions provision. See 15 U.S.C. 78u-6(a)(5) (citing 15 U.S.C. 78u-6(h)(2)(D)(i)). The government provides no affirmative reason to believe that Congress intended the "whistleblower" definition to apply only in subsections (b), (c), (d), (e), (g), and (i), but not in subsection (h).

The government's argument that "numerous federal statutes use 'whistleblower' in its ordinary sense," U.S. Br. 16 n.6, is simply misleading. The only support the government musters for that proposition is a series of citations to the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. But that Act *defines* "whistleblowers" as "individuals who make disclosures described" in another provision, *id.* § 2(a)(3), and it does not even use the term "whistleblower" in its operative provisions.[1] In fact, statutory definitions of "whistleblower" appear to be the rule, not the exception. See, *e.g.*, 7 U.S.C. 26(a)(7); 38 U.S.C. 323(g)(2)-(3); 49 U.S.C. 30172(a)(6).

Respondent notes that Congress used not just "whistleblower," but also "employee" and "individual," in the anti-retaliation provision. See Br. 26. But that does not suggest that the terms are coterminous; it merely reflects the reality that all whistleblowers are also employees and individuals. Congress's use of other terms in the anti-retaliation provision does not override the express limitation of anti-retaliation protection to "whistleblower[s]"—especially because that limitation replaced an earlier version of the provision that reached all "employee[s]." See Pet. Br. 25.

Respondent further contends that applying the statutory definition of "whistleblower" to the anti-retaliation provision would "arguably" render surplusage the references to the SEC in the first and second clauses of that provision. See Br. 31. As a preliminary matter, respondent's contention cannot easily be reconciled with the history of the anti-retaliation provision: Congress amended an earlier version of the provision to include the defined

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[1] Puzzlingly, the government cites two subsections of the Act, Section 4(a) and Section 4(b), that do not even use the term "whistleblower." See U.S. Br. 16 n.6.

term "whistleblower" at a time when the phrases "to the Commission" and "of the Commission" already appeared in what are now the first two clauses. See Pet. Br. 25.

More broadly, there is no surplusage sufficient to render the plain-text interpretation absurd. The references to the SEC in the first and second clauses merely define (and limit) the conduct protected by those clauses. They do not duplicate the "whistleblower" definition, which establishes the category of individuals entitled to protection. And language that clarifies or "remove[s] any doubt" about an issue does not constitute impermissible surplusage. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (citation omitted).

Finally on this score, respondent simply invents a new canon of statutory interpretation: the canon of the lowercase letter. See Br. 25, 35. But there is no such canon. While the contagion of Defined Terms has spread from contracts into legal briefs, it has not yet infected the United States Code: Congress does not usually capitalize otherwise uncapitalized terms to signal that they bear a statutorily defined meaning. See, *e.g.*, 1 U.S.C. 1-8. Congress's failure to capitalize "whistleblower" is thus of no import.

Respondent's desperate efforts to find a foothold for ambiguity in the statutory text are telling. Because there is no valid reason to deviate from the plain text of the statute, respondent's contrary interpretation should be rejected.

3. The Legislative History Does Not Support Respondent's Interpretation

Not only is respondent's interpretation of the anti-retaliation provision contrary to the text, but it also finds no support in the legislative history.

a. As respondent seemingly concedes (Br. 42), the purpose of Section 922(a) was to create a "new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 176, 111th Cong., 2d Sess. 38 (2010). Because the statute was intended to channel information about securities-law violations to the SEC, Congress limited both the reward and the anti-retaliation provisions to whistleblowers who reported such information in a manner satisfactory to the SEC. The legislative history is thus consistent with the plain text.

Respondent's efforts to put a different spin on the legislative history are unavailing. Respondent oddly begins by devoting two pages to describing the purpose of the *Sarbanes-Oxley Act's* anti-retaliation provision, contending that the plain-text interpretation of the Dodd-Frank Act "frustrat[es] Sarbanes-Oxley's key framework." Br. 33-34. This case, however, involves the Dodd-Frank Act, not the Sarbanes-Oxley Act, which was enacted eight years earlier. And limiting anti-retaliation protection under the Dodd-Frank Act to "whistleblower[s]" in no way interferes with the Sarbanes-Oxley Act's regime. Rather, it gives independent effect to that Act's anti-retaliation provision and leaves it to serve its intended purpose of protecting whistleblowers who report fraudulent activity more broadly. See Pet. Br. 26-30.

When it comes to the Dodd-Frank Act itself, respondent flails. As discussed above, Congress initially defined the persons protected by the anti-retaliation provision to include all "employee[s]" and later limited the protected persons to "whistleblower[s]." See p. 13. Respondent contends that the change did "nothing to modify the scope of the statute," because the protected *conduct* focused on providing information to the SEC both immediately before and immediately after the change. Br. 41-42. But

even if that is correct—and it is far from clear that it is—it misses the point: Congress specifically abandoned broader language in favor of narrower language in describing the protected *category of individuals*.

Respondent primarily focuses on the fact that the third clause of the anti-retaliation provision was a last-minute addition, thereby suggesting that Congress failed to notice that the third clause was incorporating the definition of "whistleblower." See Br. 40-41. Like the government, however, respondent seemingly takes the position that the definition of "whistleblower" does not apply to the *entire* anti-retaliation provision, including the first and second clauses—which long predated the third clause. See Br. 24; U.S. Br. 14-17. Respondent thus cannot argue that the incorporation of the definition in the anti-retaliation provision was some sort of last-minute drafting error. And applying the definition of "whistleblower" to the third clause, like the first and second, is entirely consistent with Congress's broader goal of promoting reporting to the SEC.

b. The government goes a step further than respondent, suggesting that Congress added the third clause in order to address shortcomings in the Sarbanes-Oxley Act's anti-retaliation regime. See U.S. Br. 2, 27-28. That theory is based on three excerpts from the legislative history, all referencing whistleblowers at Lehman Brothers who reported internally and then suffered retaliation. Two of the excerpts, however, come from the congressional investigation into Lehman Brothers in the wake of the financial crisis. See 156 Cong. Rec. 7083-7084 (2010); *Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner: Hearing Before the House Committee on Financial Services*, 111th Cong. 68, 75-77, 128, 175-178 (2010). Nothing in the legislative history connects

those references to Congress's consideration of the anti-retaliation provision of the Dodd-Frank Act.

In fact, the third excerpt affirmatively refutes such a connection. The government cites comments by Senator Menendez concerning retaliation against Lehman Brothers employees. See U.S. Br. 2. But Senator Menendez offered those comments while proposing an amendment to the anti-retaliation provision of the *Sarbanes-Oxley Act*. See 156 Cong. Rec. 7236 (2010).

Senator Menendez's proposed amendment, moreover, bore no resemblance to what would eventually become the anti-retaliation provision of the Dodd-Frank Act. It did not suggest that whistleblowers covered by the Sarbanes-Oxley Act should have a direct cause of action in federal court, double backpay, or a six-year statute of limitations. Instead, it sought to ensure that, *inter alia*, those whistleblowers had the right to a jury trial; 180 days, instead of 90, to file a claim; and protection from pre-dispute arbitration agreements. See S. Amend. 3841 to S. Amend. 3739 to Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. S. 3268 (2010).

Congress ultimately *adopted* those improvements to the Sarbanes-Oxley Act's anti-retaliation regime in Section 922(c) of the Dodd-Frank Act. Congress's decision in Section 922(c) to bolster the remedy provided to whistleblowers under the Sarbanes-Oxley Act negates any inference that Congress intended to extend the protections of *Section 922(a)* to such persons when it added the third clause to the Dodd-Frank Act's anti-retaliation provision.

B. The SEC's Contrary Interpretation Is Not Entitled To Deference

Respondent and the government (in its fallback argument) contend that this Court should defer to the SEC's interpretation of the Dodd-Frank Act's anti-retaliation

provision. See Br. 21-23, 42-54; U.S. Br. 32-35. That contention lacks merit for two reasons.

1. Despite his best efforts, respondent has failed to identify any relevant ambiguity in the Dodd-Frank Act's whistleblower provisions. The plain text compels the conclusion that the anti-retaliation provision applies only to a "whistleblower," as the statute defines the term. Where, as here, Congress has "directly spoken to the precise question at issue," the Court should not proceed past the first step of the *Chevron* inquiry. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

2. Even if the Court were to reach *Chevron*'s second step, the SEC's interpretation would warrant no deference because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). The SEC initially proposed a rule consistent with the statutory definition of "whistleblower." See 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010). In its final rule, however, the SEC announced an alternative definition of "whistleblower" for purposes of the anti-retaliation provision that abandoned the statutory requirement of reporting to the SEC. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011). As a result, the proposed rule failed to give fair notice of the contents of the final rule, thereby violating a basic requirement of notice-and-comment rulemaking. See *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007).

a. Neither respondent nor the government seriously disputes that this about-face occurred. Instead, they try to salvage the SEC's interpretation by raising two threshold objections. Neither withstands scrutiny.

i. Respondent and the government first contend that petitioner's argument that *Chevron* deference is not warranted because the SEC's rule was procedurally defective was forfeited below and is not fairly included in the question presented. See Br. 43-45; U.S. Br. 35. That contention lacks merit.

As to the lower courts: petitioner argued below, in response to respondent's argument, that the SEC's interpretation was not entitled to *Chevron* deference. See Pet. C.A. Br. 21-27. The rule's procedural defects are simply an additional reason why deference is not warranted—or a "new argument to support what has been [petitioner's] consistent claim," which this Court has long permitted. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); see generally Stephen Shapiro et al., *Supreme Court Practice* § 6.26(b), at 466 (10th ed. 2013).

As to this Court: petitioner's petition presented the question "[w]hether the anti-retaliation provision for 'whistleblowers' in the Dodd-Frank [Act] extends to individuals who have not reported alleged misconduct to the [SEC] and thus fall outside the Act's definition of a 'whistleblower.'" Pet. i. Respondent's proposed answer to that question primarily rests on the doctrine of *Chevron* deference. See, *e.g.*, Br. 21-25. Having invoked (and relied so heavily on) that doctrine, respondent cannot fairly argue that petitioner is barred from offering a particular reason why *Chevron* deference is not warranted—an issue that is plainly bound up in the question presented. See, *e.g.*, *Vance* v. *Terrazas*, 444 U.S. 252, 258-259 n.5 (1980).

ii. Respondent (but not the government) next contends that petitioner's argument that *Chevron* deference is not warranted because the SEC's rule was procedurally defective is time-barred under the Administrative Procedure Act (APA). See Br. 45-46. But that misapprehends the nature of petitioner's argument. Petitioner is not

bringing an affirmative claim under the APA to invalidate the SEC's rule or otherwise to take action against the SEC. Instead, petitioner is merely arguing, as part of its defense against a private lawsuit, that the rule's procedural deficiencies preclude deference. It would be passing strange if the question whether an agency interpretation is entitled to *Chevron* deference turned on the timing of litigation implicating the interpretation—particularly because parties will often have no incentive affirmatively to challenge a procedurally defective rule during the APA's limitations period.

b. Respondent and the government offer only the feeblest defense of the SEC's facially deficient rulemaking process.

i. Respondent plucks excerpts out of the SEC's notice of proposed rulemaking in an effort to show that the SEC was concerned about internal reporting. See Br. 47-48. But respondent fails to identify any indication in the notice that the SEC was considering expanding the anti-retaliation provision to cover those who only report internally. Respondent is left to fill in the gaps himself, postulating that "one obvious difficulty with balancing [the whistleblower program and internal reporting] is that an employee might fear retaliation if she reports internally" and that "[a]n obvious solution is to protect internal reporters from retaliation." Br. 48. But the SEC did not suggest that possibility in its notice.

Respondent fares no better when he addresses the comments submitted in response to the notice. He cites three out of the 240 submitted comments, but those comments do little to show that interested parties were generally on notice of the potential expansion of the definition

of "whistleblower." See Br. 48-49.[2] And the SEC did not cite those comments in unexpectedly adopting its expanded definition. See 76 Fed. Reg. at 34,301-34,304.

Not only did the SEC fail to provide fair notice, but it also gave no "adequate reasons for its decision[]" to abandon the "whistleblower" definition for part of the rule. *Encino Motorcars*, 136 S. Ct. at 2125. Respondent cites one reference to internal reporting in the final rule, but that reference occurred in the context of discussing eligibility under the award provisions. See Br. 50 (citing 76 Fed. Reg. at 34,325); see also U.S. Br. 8 (citing similar additional references). The reference does not *explain* the SEC's expansion of the definition of "whistleblower" for purposes of the anti-retaliation provision. The SEC's explanation was as deficient as its notice, and the interpretation in the final rule is invalid for that reason as well.

ii. As a last-ditch effort to defend the SEC's rule, respondent (but not the government) contends that the SEC's initial rule, and the SEC's subsequent interpretive guidance, were valid interpretive rules that did not require notice and comment and that warrant *Chevron* deference. See Br. 51-54. That contention lacks merit.

As to the SEC's initial rule: the SEC did not issue an interpretive rule in the first instance. It chose to proceed through notice-and-comment rulemaking, and the question now is whether the interpretation in the resulting

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[2] One of respondent's amici suggests that members of the business community previously supported internal reporting but have now abandoned that position. See Sen. Grassley Br. 13-14. That is incorrect. The Chamber of Commerce, for example, supported making award eligibility *contingent* on an employee's use of an internal reporting system where available—a position the SEC rejected in its final rule. The Chamber never proposed providing anti-retaliation protection to those who *only* report internally. See Chamber Br. 21-22.

rule is entitled to *Chevron* deference. For the reasons already discussed, it is not. The mere possibility that the agency *could* have proceeded with an interpretive rule cannot excuse the actual rule's procedural defects. Otherwise, an agency could sidestep the requirements of notice-and-comment rulemaking after the fact by repackaging a defective rule as an interpretive rule. In any event, it is doubtful that the SEC would have opted for an interpretive rule in the first place, because such a rule would have lacked the "force and effect of law." *Perez* v. *Mortgage Bankers Association*, 135 S. Ct. 1199, 1204 (2015) (citation omitted).

As to the SEC's interpretive guidance: that guidance merely purported to "clarify the meaning and application" of parts of the initial rule and attempted to provide the explanation absent in the initial rule for the expansion of the "whistleblower" definition. 80 Fed. Reg. 47,829 (Aug. 10, 2015). As petitioner has explained, however, a *post hoc* interpretation of a procedurally defective rule cannot cure its deficiencies. See Pet. Br. 44.

* * * * *

The SEC's rulemaking process was highly irregular. But even if it were otherwise, respondent cannot resolve the fundamental inconsistency between the statutory text, which provides one definition of "whistleblower" for purposes of the Dodd-Frank Act's whistleblower provisions, and the SEC's rule, which provides two. Because the statutory text is unambiguous, the Court need not even consider the SEC's rule.[3] Instead, the Court need

[3] Should the Court somehow conclude both that the statutory text is ambiguous and that the procedural defects in the SEC's rulemaking can be excused, it should order supplemental briefing to consider whether *Chevron* should be overruled.

only hold, consistent with the plain text of the statute, that an individual must report a securities-law violation to the SEC in order to bring a claim under the Dodd-Frank Act's anti-retaliation provision. The Ninth Circuit's contrary interpretation of the statute is unsustainable, and its judgment should therefore be reversed.

Respectfully submitted.

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DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, prohibits employer retaliation against whistleblowers who make specified disclosures. 15 U.S.C. 78u-6(h)(1). The question presented is as follows:

Whether that prohibition encompasses retaliation against individuals who report violations of the securities laws to company management but not to the Securities and Exchange Commission.

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In the Supreme Court of the United States

No. 16-1276

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of the prohibition on employer retaliation against whistleblowers that is imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376. The United States has a substantial interest in the resolution of that question. The Department of Justice and the Securities and Exchange Commission (Commission) administer and enforce provisions of Dodd-Frank, including the anti-retaliation provisions codified at 15 U.S.C. 78u-6(h)(1), and other federal securities laws. The Commission has issued a rule that addresses the question presented, 17 C.F.R. 240.21F-2(b), and the Commission filed an amicus brief supporting respondent in the court of appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in this brief's appendix. App., *infra*, 1a-30a.

STATEMENT

1. In the wake of the 2008 financial crisis, Congress enacted Dodd-Frank to "promote the financial stability of the United States by improving accountability and transparency in the financial system." 124 Stat. 1376. Dodd-Frank responded to numerous perceived shortcomings in financial regulation, including the failure of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Pub. L. No. 107-204, 116 Stat. 745, to prevent retaliation against corporate whistleblowers who alerted internal management about securities-law violations and fraud.

In particular, Members of Congress expressed concern that whistleblowers at Lehman Brothers had "tried to alert management to illegal accounting tricks," but were "fired" in retaliation for their internal disclosures. 156 Cong. Rec. 7235, 7236 (2010); see *id.* at 7083-7084 (Lehman Brothers did not "listen to the alarms that were sounded in [its] own company, * * * [i]nstead, those people who were trying to tell the truth were forced out."); *Hearing Before the House Committee on Financial Services: Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner*, 111th Cong., 2d Sess. 68, 75-77, 128, 175-178 (2010) (describing Lehman Brothers whistleblowers, including one who was fired days after informing internal management about improper accounting practices and another at a Lehman Brothers subsidiary who was fired for disclosures to the FBI).

To address that problem, among others, Congress included two distinct measures in Section 922 of Dodd-

Frank, codified at 15 U.S.C. 78u-6, that "extend[] protection comprehensively to corporate whistleblowers." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014).

a. First, Section 78u-6 creates an *award* program for whistleblowers who provide useful information to the Commission. Subsection (a) states that "[i]n this section the following definitions shall apply," and then defines six terms that are used to delineate the award program: "covered judicial or administrative action," "Fund," "original information," "monetary sanctions," "related action," and "whistleblower." 15 U.S.C. 78u-6(a). The term "whistleblower" is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). Subsections (b)-(g) govern the operation of the whistleblower award program. 15 U.S.C. 78u-6(b)-(g).

b. Second, Section 78u-6 prohibits *retaliation* by employers against whistleblowers. Subparagraph (h)(1)(A) provides that, in three specified scenarios, "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower." 15 U.S.C. 78u-6(h)(1)(A).

Clause (i) prohibits retaliation against a whistleblower for lawful acts in "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i). Clause (ii) prohibits retaliation against a whistleblower for lawful acts in "initiating, testifying in, or assisting in any investigation or

judicial or administrative action of the Commission based upon or related to [the] information" provided to the Commission under clause (i). 15 U.S.C. 78u-6(h)(1)(A)(ii).

Clause (iii) was added late in the legislative process, after both Houses of Congress had passed bills that included only clauses (i) and (ii), and amid the discussion of Sarbanes-Oxley's failure to protect internal whistleblowers at Lehman Brothers. See p. 2, *supra*; H.R. 4173, 111th Cong. § 922(a) (2010) (conference base text approved for use by the Senate in May 2010). Clause (iii) prohibits retaliation against a whistleblower for lawful acts in "making disclosures that are required or protected under" several cross-referenced laws, including Sarbanes-Oxley; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*,[1] "including section 78j-1(m)"[2]; 18 U.S.C. 1513(e); and "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii).

The laws cross-referenced by clause (iii) require or protect disclosures to other entities in addition to the Commission. Sarbanes-Oxley, for example, includes a provision entitled "Whistleblower Protections for Employees of Publicly Traded Companies," that prohibits employer retaliation against employees for disclosing violations of certain securities and fraud laws to any federal "regulatory or law enforcement agency," "any Member of Congress or any committee of Congress," or

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[1] The whistleblower provisions of Dodd-Frank are codified as Section 21F of the Exchange Act, which clause (iii) incorporates by reference through the phrase "this chapter." 15 U.S.C. 78u-6(h)(1)(A)(iii).

[2] Section 78j-1(m) was enacted through Sarbanes-Oxley, 116 Stat. 775-777, and is codified as part of the Exchange Act.

"a person with supervisory authority over the employee." 18 U.S.C. 1514A(a)(1). Another provision of Sarbanes-Oxley—one that clause (iii) expressly singles out—protects certain internal disclosures about auditing matters. 15 U.S.C. 78j-1(m)(4). Similarly, Sarbanes-Oxley *requires* attorneys representing public companies to disclose securities-law or fiduciary-duty violations to specified company officials, not to the Commission. 15 U.S.C. 7245; see 17 C.F.R. 205.3.

The Exchange Act, which clause (iii) also cross-references, similarly requires registered public accounting firms to report illegal acts discovered during certain audits to the audited public company's management. 15 U.S.C. 78j-1(b). Another statute that clause (iii) cross-references, 18 U.S.C. 1513(e), prohibits harmful retaliation against any person for "providing to a law enforcement officer any truthful information relating to" a federal offense. And numerous other laws, rules, or regulations "subject to the jurisdiction of the Commission," 15 U.S.C. 78u-6(h)(1)(A)(iii), require internal reporting.[3]

c. Like a "person" who alleges a violation of the whistleblower provisions of Sarbanes-Oxley, 18 U.S.C. 1514A(b), an "individual" who alleges a violation of Dodd-Frank's anti-retaliation provisions may seek relief from his or her employer, 15 U.S.C. 78u-6(h)(1)(B)(i). The remedial schemes created by the two

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[3] See, *e.g.*, 17 C.F.R. 270.38a-1(a)(4) (mutual fund's chief compliance officer must report material compliance matters to fund's board); 17 C.F.R. 240.17a-5(h) (broker-dealer's auditor must report material inadequacies to broker-dealer's chief financial officer); 17 C.F.R. 275.204A-1(a)(4) (investment adviser must adopt code of ethics requiring supervised persons to report violations thereof to chief compliance officer).

statutes, however, differ significantly. Sarbanes-Oxley directs an aggrieved person to file a complaint with the Department of Labor (DOL), which can either adjudicate the claim through an administrative process subject to review by a federal court of appeals, or leave the person to bring a cause of action in federal district court. *Ibid.*; 49 U.S.C. 42121(b); 29 C.F.R. 1980.103-.110, 1980.114. Dodd-Frank, by contrast, allows an immediate action in federal district court. 15 U.S.C. 78u-6(h)(1)(B)(i). Sarbanes-Oxley includes a six-month baseline statute of limitations, 18 U.S.C. 1514A(b)(2)(D), while Dodd-Frank's baseline statute of limitations is six years, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(aa). And Sarbanes-Oxley provides that an employee "shall be entitled to all relief necessary to make the employee whole," including back pay, 18 U.S.C. 1514A(c)(1), while Dodd-Frank authorizes double "the amount of back pay otherwise owed," 15 U.S.C. 78u-6(h)(1)(C)(ii).

d. Section 78u-6 authorizes the Commission to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. 78u-6(j).

2. In 2011, the Commission issued Rule 21F-2 and related rules addressing both the award and anti-retaliation provisions of Section 78u-6. See 76 Fed. Reg. 34,300 (June 13, 2011).

For purposes of the award program, Rule 21F-2 states that "[y]ou are a whistleblower if, alone or jointly with others, you provide the Commission with information" related "to a possible violation of the Federal securities laws" pursuant "to the procedures set forth in" another Commission rule. 17 C.F.R. 240.21F-2(a),

That other rule requires information to be submitted either through the Commission's website or by mailing or faxing a form to the Commission's Office of the Whistleblower. 17 C.F.R. 240.21F-9(a).

For purposes of the anti-retaliation provisions, Rule 21F-2 states that a person is a "whistleblower" if he provides information that he reasonably believes relates to a possible violation of the securities or certain criminal fraud laws, and if he "provide[s] that information in a manner described in" clauses (i) through (iii) of 15 U.S.C. 78u-6(h)(1)(A)—that is, to the Commission as part of the whistleblower award program, through certain forms of participation in a Commission proceeding, or through disclosures protected or required by the laws cross-referenced in clause (iii), which protect internal disclosures and do not require reporting to the Commission. 17 C.F.R. 240.21F-2(b)(1).[4]

In adopting its rules, the Commission explained that encouraging reporting through *internal* compliance procedures, such as those required or protected by the laws cross-referenced in clause (iii), advances the purposes of Section 78u-6. Specifically, the Commission explained that internal reporting enables the private sector to screen out meritless claims, and thereby improves the quality of whistleblower tips later brought to the Commission; that internal reporting gives businesses the opportunity to self-correct without the need for intrusive Commission investigations; and that internal re-

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[4] In 2015, the Commission issued an interpretive rule explaining that a whistleblower is protected from retaliation even if he does not utilize the channels established by the Commission for the award program—*i.e.*, by reporting through the Commission's website or its Office of the Whistleblower. 80 Fed. Reg. 47,829 (Aug. 10, 2015).

porting thereby promotes efficient use of both corporate and government resources. See 76 Fed. Reg. at 34,323-34,325, 34,359 & nn.449-450 (citing S. Rep. No. 176, 111th Cong., 2d Sess. 110 (2010)).[5] The Commission also considered and responded to public comments, many of which urged the agency to adopt rules that would encourage or require internal reporting. *E.g.*, *id.* at 34,302 n.21, 34,326 n.230 (citing comment letters from the U.S. Chamber of Commerce).

3. Petitioner is a public company operating as a real estate investment trust. Pet. App. 14a. Respondent was a portfolio-management vice president employed by petitioner from 2010 to 2014. *Id.* at 3a, 14a. Respondent has alleged that he made multiple reports to petitioner's senior management about alleged securities-law violations by his supervisor, including elimination of internal corporate controls in violation of Sarbanes-Oxley, hiding millions of dollars in cost overruns, and granting no-bid contracts and unsubstantiated payments to friends. *Id.* at 3a, 14a-15a. Respondent has further alleged that petitioner fired him because of his disclosures. *Ibid.* It is undisputed that respondent did not "report his concerns to the SEC before [petitioner] terminated his employment." *Id.* at 3a.

Respondent filed this lawsuit. His complaint alleged, *inter alia*, that petitioner had fired him for making disclosures that were required or protected under Sarbanes-Oxley and thus were protected by clause (iii) of

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[5] The Commission's rules governing the whistleblower award program also underscore the benefits of internal reporting in advancing the purposes of Section 78u-6. See 17 C.F.R. 240.21F-4(b)(7) and (c)(3), 240.21F-6(a)(4) and (b)(3) (treating internal reporting as assisting in establishing whistleblower award eligibility and in enhancing award amount).

the anti-retaliation provisions in 15 U.S.C. 78u-6(h)(1)(A)(iii). Pet. App. 3a, 14a-15a. Petitioner moved to dismiss the suit, arguing that respondent was not a "whistleblower" under Section 78u-6 because he had not provided information "to the Commission" as required by the definition of "whistleblower" in 15 U.S.C. 78u-6(a)(6). Pet. App. 3a, 17a-18a.

4. The district court denied petitioner's motion to dismiss. Pet. App. 12a-43a. The court explained that clause (iii)'s protection of disclosures by whistleblowers under statutes (like Sarbanes-Oxley) that require or protect disclosures to entities other than the Commission "conflict[s] with the assumption that only those who report to the" Commission are protected. *Id.* at 33a. The court observed that, in circumstances where applying a statutory definition "would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two, the normal meaning should be applied." *Id.* at 28a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)). The court held that the tension between the anti-retaliation protections and the statutory definition created ambiguity, and that the Commission's reasonable interpretation in Rule 21F-2 was entitled to deference. *Id.* at 35a-41a.

5. On interlocutory appeal, the court of appeals affirmed. Pet. App. 1a-11a.

The court of appeals concluded that Section 78u-6's "definitional provision * * * should not be dispositive of the scope of [Section 78u-6's] later anti-retaliation provision." Pet. App. 7a. The court explained that limiting retaliation protection to whistleblowers who report to the Commission "would make little practical sense and undercut congressional intent" because it

"would, in effect, all but read [clause] (iii) out of the statute." *Id.* at 8a. The court stated that it would avoid that "illogical" result by applying the statutory definition only to the whistleblower-award provisions. *Ibid.* As an alternative ground for its decision, the court of appeals joined the Second Circuit by concluding that "the agency responsible for enforcing the securities laws"—the Commission—"has resolved any ambiguity and its regulation is entitled to deference." *Id.* at 10a; see *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 146, 150-155 (2d Cir. 2015).

Judge Owens dissented. Pet. App. 11a. He would have followed the reasoning of Judge Jacobs's dissent in *Berman*, 801 F.3d at 155, and the panel opinion in *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). Pet. App. 11a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that 15 U.S.C. 78u-6(h)(1)(A)(iii) prohibits employers from retaliating against whistleblowers who make specified disclosures, regardless of whether those whistleblowers report to the Commission.

A. Section 78u-6 establishes two distinct measures to encourage whistleblowers to report potential securities-law violations and fraud. First, the provision creates an award program for whistleblowers who bring valuable information to the Commission. Second, the provision prohibits job-related retaliation against whistleblowers who make specified types of disclosures. The text and structure of the statute indicate that the specialized definition of "whistleblower" applies to the award program but not to the retaliation prohibitions.

Subsection (a) of Section 78u-6 defines six terms, each of which appears in the award provisions created

in Subsections (b) through (g), and each of which fits naturally there. The term "whistleblower," for example, requires reporting to the Commission, consistent with the fact that awards are available only after successful Commission actions.

Except for "whistleblower," however, none of Section 78u-6's defined terms appears in the anti-retaliation provisions of paragraph (h)(1). The statutory text and structure indicate that paragraph (h)(1) uses "whistleblower" in accordance with its ordinary meaning, not as a term of art that requires reporting to the Commission. Subparagraph (h)(1)(A) contains three clauses that prohibit retaliation for three distinct types of whistleblowing. The first two clauses reference reports to the Commission, but clause (iii) does not—a textual distinction that should be read to make a substantive difference. Indeed, clause (iii) protects disclosures under laws that themselves protect or even require "[w]histleblower[s]" to report to entities other than the Commission. 18 U.S.C. 1514A(a)(1).

Extending the specialized definition of "whistleblower" to clause (iii) would markedly narrow the ban on employer retaliation and would create anomalies inconsistent with the statutory language and design. Under petitioner's reading, clause (iii) would prohibit employers from retaliating only against employees who have reported to the Commission. But employers generally do not know that an employee has reported to the Commission, which is required to keep reports confidential, so petitioner's reading would substantially diminish the retaliation prohibition's deterrent effect. In addition, under petitioner's reading, clause (iii) would not protect an employee who reports a suspected securities-law violation to company management, in the

hope of triggering internal compliance mechanisms that will make a report to the Commission unnecessary, and who is fired immediately thereafter. Excluding such persons from Dodd-Frank's protections would depart from usual understandings of the term "whistleblower" and would undermine Congress's effort to promote more rigorous and effective internal compliance programs.

This Court has often confirmed that a statutorily defined term may retain its ordinary meaning where necessary to give effect to the language and objective of a statute. The court of appeals applied that sensible approach, preserving the specialized meaning of "whistleblower" in the award provisions, while applying its ordinary meaning to facilitate the effective implementation of the anti-retaliation provisions.

B. The legislative background and purpose further support the court of appeals' construction. The specialized definition of "whistleblower" that requires reporting to the Commission first appeared in the bill that became Dodd-Frank at a stage of the drafting process when *only* the award provisions used that term. And clause (iii) of the anti-retaliation provision, which cross-references federal statutes that expressly protect or require disclosures to entities other than the Commission, was adopted at the final stage of the legislative process, after both Houses of Congress had passed the bill. There is no indication that "the conferees who accepted the last-minute insertion of" clause (iii) intended this "subdivision of a subsection" to have "the extremely limited scope it would have" if the term "whistleblower" is construed to require reporting to the Commission. *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 154-155 (2d Cir. 2015).

Congress enacted Dodd-Frank against the backdrop of Sarbanes-Oxley, which protects *internal* whistleblowers who report securities-law violations to corporate management, but which had failed to expose improper financial practices that precipitated the 2008 financial crisis. As its cross-reference to Sarbanes-Oxley and creation of new remedies demonstrate, Section 78u-6(h)(1) is intended to strengthen protections for internal whistleblowers. Reading that provision to protect only whistleblowers who report to the Commission would defeat Congress's purpose, weaken internal corporate-compliance programs, and potentially flood the Commission with allegations that have not been vetted by the corporate insiders best situated to address them in the first instance.

C. At a minimum, the tension between the specialized definition of "whistleblower" in Subsection (a) and its more natural meaning in paragraph (h)(1) creates an ambiguity for the Commission to resolve. The Commission did so reasonably, pursuant to an express conferral of rulemaking authority, after following notice-and-comment procedures, and with a careful explanation drawing on its expertise in securities law. Petitioner's new assertion of procedural deficiencies in the rule is forfeited, outside the question presented, and without merit. The Commission's reasonable reading of Section 78u-6(h)(1) to protect both internal and external whistleblowers is entitled to deference.

ARGUMENT

THE PROHIBITION ON EMPLOYER RETALIATION AGAINST WHISTLEBLOWERS IN 15 U.S.C. 78u-6(h)(1) IS NOT LIMITED TO WHISTLEBLOWERS WHO REPORT TO THE COMMISSION

Section 78u-6 includes two distinct measures to encourage whistleblowers to report securities-law violations: awards for whistleblowers who bring valuable information to the Commission, and protection against job-related retaliation for whistleblowers who make described disclosures. The specialized definition of "whistleblower" codified in Subsection (a), which requires reporting to the Commission, fits naturally with the award program. Use of that definition in paragraph (h)(1), however, would subvert the effective implementation of the anti-retaliation provisions, which protect disclosures to other entities as well. The text and structure of the statute as a whole, as well as Congress's overriding policy of encouraging internal reporting through corporate-compliance mechanisms, indicate that the ordinary meaning of "whistleblower" applies to the anti-retaliation provisions. At a minimum, the Commission's rule adopting that interpretation, issued after notice-and-comment procedures and pursuant to an express statutory conferral of rulemaking power, is a reasonable resolution of statutory ambiguity and is accordingly entitled to deference.

A. The Statutory Text And Structure Indicate That The Anti-Retaliation Provisions Use The Term "Whistleblower" In Its Ordinary Sense

1. Section 78u-6 prohibits an "employer" from retaliating against "a whistleblower in the terms and conditions of" the whistleblower's "employment because of

any lawful act done by the whistleblower" in three specified contexts. 15 U.S.C. 78u-6(h)(1)(A). Clause (i) prohibits retaliation for "providing information to the Commission in accordance with this section," including the whistleblower award program defined earlier in the Section. 15 U.S.C. 78u-6(h)(1)(A)(i). Clause (ii) prohibits retaliation for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information"—that is, the information provided to the Commission through the prescribed means. 15 U.S.C. 78u-6(h)(1)(A)(ii). Clause (iii) prohibits retaliation for "making disclosures that are required or protected under" several provisions of law, including Sarbanes-Oxley, the Exchange Act, 18 U.S.C. 1513(e), and "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii).

Read in accordance with its ordinary meaning, the term "whistleblower" is not limited to people who report to the Commission, and it naturally encompasses employees who report wrongdoing to company management. See, *e.g.*, *New Oxford American Dictionary* 1970-1971 (3d ed. 2010) (defining "whistle-blower" as "a person who informs on someone engaged in an illicit activity"); *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/whistleblower ("one who reveals something covert or who informs against another"). That understanding is consistent with the origin of the term—the action of blowing the whistle. See *LaMangue* v. *Massachusetts Dep't of Emp't & Training*, 3 F. Supp. 2d 83, 92 (D. Mass. 1998) ("Whistleblowers may 'blow the whistle' on any number

of persons, about any number of things for any number of reasons.").[6]

The whistleblowing actions protected by subparagraph (h)(1)(A) of Section 78u-6 are not limited to providing information to the Commission. Although clause (i) includes that limitation, clause (ii) encompasses distinct acts of whistleblowing by "initiating, testifying in, or assisting" in Commission proceedings that are "based upon or related to" information provided to the Commission. 15 U.S.C. 78u-6(h)(1)(A)(ii). And clause (iii)'s lack of any such reference to the Commission indicates that "Congress intended a difference in meaning" from the requirement of Commission reporting referenced in clauses (i) and (ii). *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). That inference is reinforced by clause (iii)'s prohibition of retaliation for "disclosures that are required or protected under" other provisions of law that require or protect disclosures to entitites *other than the Commission*. 15 U.S.C. 78u-6(h)(1)(A)(iii); see pp. 4-5, *supra*. As relevant here, Sarbanes-Oxley provided "[w]histleblower protection" for respondent's disclosure of alleged securities-law violations and fraud to "a person with supervisory authority over" him. 18 U.S.C. 1514A(a)(1)(C). Accordingly, under the ordinary meaning of clause (iii), petitioner was prohibited from firing

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[6] Likewise, numerous federal statutes use "whistleblower" in its ordinary sense. See, *e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, §§ 2(a)(3), (b)(2)(A), 4(a) and (b), 103 Stat. 16, 16, 32; see also *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 916 (2015) (describing "whistleblower protection" under the Act).

respondent for his disclosure to company management of alleged corporate wrongdoing.

2. The definition of "whistleblower" codified at 15 U.S.C. 78u-6(a)(6), which requires reporting "to the Commission, in a manner established" by the Commission, does not compel a different result.

a. As petitioner correctly notes (Br. 17-18), statutory definitions "control the meaning of statutory words * * * *in the usual case*." *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (emphasis added). The Court has made clear, however, that this is not an ironclad rule. See *ibid.*; *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 575-576 (2007) (explaining that there is no "irrebuttable 'presumption that the same defined term in different provisions of the same statute must' be interpreted identically"); *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983) (noting that a statutory definition is "not dispositive"). Rather, "a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) *(UARG)* (citation omitted); accord Scalia & Garner 228 ("Definitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications."). That is true even when the definitional provision states expressly that the specialized meaning applies to a particular section or chapter of a law. See *UARG*, 134 S. Ct. at 2441; *Duke Energy*, 549 U.S. at 576.

This Court has accordingly declined to apply "in mechanical fashion" statutory definitions that would "create obvious incongruities in the language" of a statute

or "destroy one of the major purposes" of the law. *Suwannee Fruit*, 336 U.S. at 201; see, *e.g.*, *UARG*, 134 S. Ct. at 2441; *Duke Energy*, 549 U.S. at 575-576; *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-346 (1997); *United States* v. *Public Utilities Comm'n of Cal.*, 345 U.S. 295, 312-313 (1953). That is especially true when a statutory definition conflicts with the defined term's "most natural" meaning. *Philko*, 462 U.S. at 411; see *Suwannee Fruit*, 336 U.S. at 201; *Franklin Cal. Tax-Free Trust* v. *Puerto Rico*, 805 F.3d 322, 340 (1st Cir. 2015) ("Where statutory definitions give rise to such problems, a term may be given its ordinary meaning."), aff'd, 136 S. Ct. 1938 (2016).

In some cases, the ordinary meaning adopted may be narrower than the statutory definition, see, *e.g.*, *UARG*, 134 S. Ct. at 2441-2442; in other cases, the ordinary meaning adopted may be broader than the statutory defintion, see, *e.g.*, *Suwannee Fruit*, 336 U.S. at 201-206 (adopting the "broader and more usual" meaning of "disability," rather than treating the word as a specialized statutory "term of art"). In all cases, "[c]ontext counts." *Duke Energy*, 549 U.S. at 576.

b. The definition on which petitioner relies states that "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). The "manner established" by Commission rule is by reporting "[o]nline, through the Commission's Web site," or "[b]y mailing or faxing a" specified form "to the SEC Office of the Whistleblower." 17 C.F.R. 240.21F-9(a).

This specialized definition of "whistleblower," like the five other definitions contained in Subsection (a), fits naturally with the whistleblower *award* program created by Subsections (b)-(g) of Section 78u-6. Dodd-Frank directs the Commission to pay awards to "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). By defining the term "whistleblower" to mean a person who reports wrongdoing "to the Commission," Section 78u-6(a)(6) incorporates a fundamental eligibility criterion under the award program. Likewise, because the payment of awards is governed by "regulations prescribed by the Commission," *ibid.*, a whistleblower must report "in a manner established * * * by the Commission," 15 U.S.C. 78u-6(a)(6). And because the award program allows multiple whistleblowers to divide an award of a statutorily limited amount, 15 U.S.C. 78u-6(b)(1), either a single "individual * * * or 2 or more individuals acting jointly" can qualify as a "whistleblower," 15 U.S.C. 78u-6(a)(6). Applying the specialized definition of "whistleblower" in Subsection (a) to the award program created by Subsections (b)-(g) thus accords with the fundamental rule that courts should "interpret the statute as a symmetrical and coherent regulatory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation and internal quotation marks omitted).

c. By contrast, extending the specialized definition of "whistleblower" in Subsection (a) to the anti-retaliation protections in paragraph (h)(1) would "create obvious incongruities in the language." *Suwannee Fruit*, 336 U.S. at 201. None of the other five terms de-

fined in Subsection (a)—"covered judicial or administrative action," "Fund," "original information," "monetary sanctions," or "related action"—appears in paragraph (h)(1). 15 U.S.C. 78u-6(a). Rather, all of those terms are used exclusively in Subsections (b)-(g), which define and delimit the award program. Although the term "whistleblower" is both defined in Subsection (a) and used in paragraph (h)(1), extending the specialized definition to the anti-retaliation provisions would produce "substantive effect[s]" not "compatible with the rest of the law." *UARG*, 134 S. Ct. at 2442 (citation omitted); see *Public Utilities Comm'n*, 345 U.S. at 312 (departing from specialized statutory definition based on "the statutory scheme as a whole").

Most significantly, applying the specialized definition of "whistleblower" to the anti-retaliation provisions in paragraph (h)(1) would "vitiate much of the protection afforded by" the ordinary meaning of clauses (ii) and (iii). *Robinson*, 519 U.S. at 345. Clause (ii) prohibits job-related retaliation against a whistleblower "because of any lawful act done by the whistleblower * * * in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission" that is "based upon or related to" information provided to the Commission under Section 78u-6. 15 U.S.C. 78u-6(h)(1)(A)(ii). Petitioner's argument logically implies that an individual who testifies in a Commission enforcement action is protected from retaliation only if he falls within Section 78u-6(a)(6)'s definition of "whistleblower." Under that approach, an employer could fire an employee for giving such testimony if the employee had not previously reported to the Commission online or through the specified written form. See 15

U.S.C. 78u-6(a)(6); 17 C.F.R. 240.21F-9(a). That construction "would thwart the premise of" clause (ii)'s protections, which is cause to depart from the statutory definition. *Public Utilities Comm'n*, 345 U.S. at 313.[7]

Extending the specialized definition of "whistleblower" to clause (iii) would do even greater violence to the statutory design. As noted above, pp. 4-5, *supra*, clause (iii) prohibits retaliation against a whistleblower for "making disclosures that are required or protected under" various laws that "require[] or protect[]" disclosures to recipients other than the Commission. 15 U.S.C. 78u-6(h)(1)(A)(iii). The "[w]histleblower protection" provisions of Sarbanes-Oxley incorporated by clause (iii) protect disclosures to any federal "regulatory or law enforcement agency," "any Member of Congress or any committee of Congress," or "a person with supervisory authority over the employee." 18 U.S.C. 1514A(a)(1). A Sarbanes-Oxley provision specifically referenced in clause (iii), 15 U.S.C. 78j-1(m), expressly protects internal disclosures about auditing matters. Other provisions of Sarbanes-Oxley and the Exchange Act *require* certain auditors and attorneys to disclose certain information internally. 15 U.S.C. 78j-1(b) and 7245; see 17 C.F.R. 205.3.[8] And another provision specifically referenced in clause (iii), 18 U.S.C. 1513(e), which protects reports to law enforcement officers

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[7] The limitations that petitioner would place on anti-retaliation suits under paragraph (h)(1) would also severely weaken the confidentiality protections in 15 U.S.C. 78u-6(h)(2)(A), which generally require the Commission to keep reported information secret, because a plaintiff would be required to identify himself as having reported to the Commission in order to bring a cause of action.

[8] Indeed, attorneys are typically prohibited from reporting to the Commission. Pet. App. 7a (citing 17 C.F.R. 205.3(d)(2)).

about federal offenses, necessarily requires reporting to an entity other than the Commission.

Construing clause (iii) to protect only those individuals who report to the Commission would substantially diminish the practical effect of that provision. *Inter alia*, petitioner's reading would deny Section 78u-6 protection to "[l]egions of accountants and lawyers" that Congress concluded are "equipped to bring fraud on investors to a halt," but who must report internally under the laws cross-referenced in clause (iii). *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1168 (2014). That would disserve Congress's objectives by "leav[ing] these professionals vulnerable to discharge or other retaliatory action for complying with the law," *id.* at 1171, and it is incompatible with this Court's characterization of Dodd-Frank as "extending protection comprehensively to corporate whistleblowers," *id.* at 1175.

Auditors and attorneys are not the only potential corporate whistleblowers excluded by petitioner's interpretation of clause (iii). Given that persons who suffer employment-related retaliation *because of* their disclosures to the Commission are separately protected by clause (i), the practical effect of clause (iii) under petitioner's reading is, at most, to extend protection to a "whistleblower who reports misconduct *both* to the SEC *and* to another entity, but suffers retaliation 'because of' the non-SEC disclosure." Pet. Br. 32 (quoting 15 U.S.C. 78u-6(h)(1)(A)(iii)); see *id.* at 22. Petitioner is correct that clause (iii) applies to such individuals. Construing clause (iii) as *limited* to such persons, however, would "shrink to insignificance the provision's ban on retaliation" and produce anomalous results. *Lawson*, 134 S. Ct. at 1166.

Of the whistleblowers who received awards from the Commission in 2016, about 80% reported internally before reporting to the Commission. SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18. There are numerous reasons why employees tend to report internally first, including loyalty to the organization, hope that supervisors will rectify or explain the perceived misconduct without the need for government intervention, or (as with auditors and attorneys) a legal obligation to raise a matter in-house. See Janet P. Near & Marcia P. Miceli, *After the Wrongdoing: What Managers Should Know About Whistleblowing*, 59 Bus. Horizons 105, 105, 113 (2016). Studies also show that retaliation for internal reporting, when it occurs, generally follows quickly. See *International Handbook on Whistleblowing Research* 242 (A.J. Brown et al. ed., 2014). The persons whom clause (iii) would protect under petitioner's reading—*i.e.*, those who report both internally and to the Commission, and who suffer retaliation because of the internal reporting—therefore are "likely to be few in number." *Berman*, 801 F.3d at 151; accord Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) (noting that "the majority of incentives for and benefits of internal whistleblowing * * * are absent [where] the employee has also reported to the SEC," and "[t]hus, it is hard to imagine what motivations would prompt the employee to make this internal disclosure at all").[9]

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[9] Petitioner cites several cases (Br. 32-33 & n.4) in which whistleblowers reported both internally and to the Commission. But it is not clear whether the plaintiffs in any of those cases—most of which have arisen under Sarbanes-Oxley rather than under Dodd-

Petitioner identifies no good reason that Congress, having chosen to protect employees from retaliation for internal disclosures, would have wished to make that protection contingent on the employees' making *additional* disclosures to the Commission. Petitioner acknowledges (Br. 32) that "an employer will often be unaware that an employee has reported to the SEC," in part because of the confidentiality protections in 15 U.S.C. 78u-6(h)(2)(A). When an employer fires an employee because of the employee's internal reporting (as respondent alleges occurred here), petitioner's reading of the statute thus makes liability under Section 78u-6 turn on a fact that the employer may not know. That unusual approach would substantially diminish Dodd-Frank's deterrent effect. Such a result would be especially peculiar in the context of an anti-retaliation provision, where liability depends on an employer's *reason* for taking a particular employment-related action. See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011).

Petitioner's reading also creates anomalies for employee whistleblowers. If two employees witness the same fraud on the same day, report that fraud to the same supervisor, and are fired at the same time because of their internal disclosures, petitioner's reading of the statute would allow a cause of action under Section 78u-6 only to the employee "savvy enough to know that [he] should take the counterintuitive step of first reporting to the SEC." *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 732-733 (D. Neb. 2014). Petitioner identifies no reason that Congress would have wished to make escalation of a concern to the federal government the

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Frank—suffered retaliation because of their internal reporting rather than because of their reporting to the Commission.

only way for an employee to obtain Section 78u-6(h)(1)(A)(iii) protection against retaliation for internal disclosures.

Moreover, nothing in Subsection (a)'s definition of "whistleblower," or in petitioner's interpretation of the statute, requires a temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation. Thus, under petitioner's reading, an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under Section 78u-6 if he had reported an insider-trading violation by his previous employer to the Commission in 2012, since the prior report would bring him within the statutory definition of "whistleblower."[10] But an employee fired for internally reporting the same accounting violation in 2017 without having made a prior report to the Commission would have no such Dodd-Frank protection.[11]

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[10] Petitioner suggests (Br. 38) that, under the court of appeals' approach, clause (iii) would provide "protection in situations having nothing to do with violating the securities laws," such as retaliation against an employee for reporting a colleague's illegal drug sales to the FBI. But to the extent that clause (iii)'s cross-reference to 18 U.S.C. 1513(e) creates that possibility, petitioner's interpretation of the term "whistleblower" does not eliminate it. Rather, under petitioner's interpretation of the statute, an employee who was fired for internally reporting drug-law violations could still invoke clause (iii) so long as the employee had also reported securities-related misconduct to the Commission.

[11] Similarly, because the statutory definition of "whistleblower" is limited to persons who report to the Commission in the manner prescribed by the Commission for the award program, 15 U.S.C. 78u-6(a)(6), an employee fired for internally reporting an accounting violation would have a cause of action under the anti-retaliation provisions if he had reported that violation to the Commission via online

Petitioner argues (Br. 13, 16) that the definitional provision, 15 U.S.C. 78u-6(a)(6), describes "who" is protected, while clauses (i)-(iii) of the anti-retaliation provisions define the "conduct" that is protected. But petitioner's approach would produce an odd disconnect between the two, since the disclosure that caused a plaintiff to *be* a "whistleblower" under the statutory definition could be wholly unrelated to the disclosure that precipitated the alleged retaliation. Rather than divorcing the definition of a protected whistleblower from the acts of whistleblowing for which he is protected, the anti-retaliation provisions are more naturally read to reflect Congress's understanding that a person who makes any of the disclosures described in clauses (i)-(iii) qualifies as a "whistleblower" *by virtue of those disclosures.*[12]

3. This Court can and should avoid the anomalous consequences of petitioner's reading by giving the term "whistleblower" its specialized meaning in the award provisions in Subsections (b)-(g), while applying the "broader and more usual concept of the word" to the anti-retaliation provisions in paragraph (h)(1). *Suwannee Fruit*, 336 U.S. at 201; cf. *Cleveland Indians*, 532 U.S. at 212-216 (rejecting a "symmetrical construction" of identical statutory language based on differences in context). That construction would give meaning to the

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form, but not if he had reported the same violation to the Commission via telephone, see 17 C.F.R. 240.21F-9(a).

[12] Petitioner observes (Br. 23) that the anti-retaliation provisions in the section of Dodd-Frank establishing the Consumer Financial Protection Bureau refer to "covered employees" rather than "whistleblowers." But as respondent explains (Br. 32), those provisions cover a broader range of protected conduct, so "whistleblower" would have been an unnatural term.

"words of the definitional section" throughout most of 15 U.S.C. 78u-6's provisions, while preserving the substantive effect of a "subdivision of a subsection that uses the defined term" in its ordinary rather than its specialized sense. *Berman*, 801 F.3d at 154; see *Bussing*, 20 F. Supp. 3d at 730 ("When the term 'whistleblower' is given its ordinary meaning—for purposes of the retaliation section only—everything falls into place. The broad protections of subsection (iii) are given effect, while rewards under the bounty program are properly limited to whistleblowers who provide tips to the SEC."). In the absence of an "iron rule" that statutory definitions must be applied no matter how incongruous or implausible the result—an interpretive approach this Court has consistently rejected, see *Duke Energy*, 549 U.S. at 576—the court of appeals' sensible reading of the statutory text and structure should be affirmed.[13]

B. The Statutory Background and Purpose Confirm That The Anti-Retaliation Provisions Use The Term "Whistleblower" In Its Ordinary Sense

The background and purpose of Section 78u-6 support the court of appeals' holding that the term "whistleblower" in the anti-retaliation provisions should be given its ordinary meaning.

1. Congress enacted Dodd-Frank to promote financial stability "by improving accountability and transparency in the financial system." 124 Stat. 1376. More specifically, Congress enacted Section 78u-6 against the

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[13] Petitioner's reliance (Br. 18-19) on *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), is misplaced. The Court in *Lamie* did not construe a statutory definition of a particular term, much less announce a categorical rule that a definitional provision must always control.

backdrop of Sarbanes-Oxley, in which Congress had sought to create strong protection for internal whistleblowers, see *Lawson*, 134 S. Ct. at 1162, but which had not adequately protected internal whistleblowers at places like Lehman Brothers, see p. 2, *supra*. The conference committee reconciling the House and Senate versions of Dodd-Frank inserted clause (iii)—which cross-references Sarbanes-Oxley and other provisions protecting internal whistleblowers—into the legislation for the first time shortly after multiple members of Congress had discussed the shortcomings in Sarbanes-Oxley and the need for stronger whistleblower protections. See *ibid.*; Pet. App. 6a.[14]

Under those circumstances, it is "doubtful that the conferees who accepted the last-minute insertion of [clause] (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition." *Berman*, 801 F.3d at 155. At a minimum, there is no basis to "attribute to Congress an intent to offer a broad array of protections with one hand, only to snatch it back with the other, leaving behind protection for only a narrow subset of whistleblowers." *Bussing*, 20 F. Supp. 3d at 733.[15]

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[14] The specialized definition of "whistleblower" first appeared in the bill at a time when the award provisions, but not the retaliation provisions, used the word "whistleblower." See H.R. 3817, 111th Cong. 2d Sess. § 203 [§ 21F(a)-(d), (f), (i)(4) and (g)(1)] (Dec. 17, 2010); H.R. 4173, 111th Cong., 2d Sess. § 7203(a) [§ 21F(a)-(d), (f), (g)(1) and (j)(4)] (introduced in the House Dec. 2, 2009; passed by the House Dec. 11, 2009).

[15] At least one commentator has suggested that Senate Banking Committee staff inserted clause (iii) into the draft legislation specifically to protect internal whistleblowers. See Stephen Kohn, *Clarifying Anti-Retaliation Protections Under Dodd-Frank*, Law 360,

2. Like other "securities laws combating fraud," Section 78u-6 should "be construed not technically and restrictively, but flexibly to effectuate [its] remedial purposes." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386-387 (1983) (internal quotation marks omitted); cf. *Kasten*, 563 U.S. at 11-14 (broadly construing anti-retaliation provisions that protect employees who "file a complaint," to cover oral complaints in light of "the Act's basic objectives"); *Robinson*, 519 U.S. at 346 (construing anti-retaliation provisions in light of their "primary purpose of * * * [m]aintaining unfettered access to remedial mechanisms").

That approach is especially appropriate given the purpose of Section 78u-6 and the practical desirability of encouraging internal whistleblowing as a way to promote corporate compliance. This Court has often emphasized the "strong tradition of professional self-regulation." *North Carolina State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1115 (2015); see *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). And numerous provisions of federal law and policy—including but not limited to those cross-referenced by clause (iii)—emphasize the importance of robust corporate-compliance mechanisms. See, *e.g.*, *U.S. Attorney's Manual* 9-28.300.A(7) (2017) (considering existence and effectiveness of corporate-compliance program in decision whether to prosecute); Sentencing Guidelines §§ 8B2.1, 8C2.5(f) (considering corporate-compliance program in sentencing determination).

Reading Section 78u-6's anti-retaliation provisions to protect internal and external whistleblowers alike

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June 22, 2017, https://www.law360.com/articles/936265/clarifying-anti-retaliation-protections-under-dodd-frank.

would "support, not undermine, the effective functioning of company compliance and related systems." 76 Fed. Reg. at 34,323. During its rulemaking, the Commission received numerous comments from businesses and related associations that urged the agency to promulgate rules encouraging or requiring internal reporting. *E.g.*, *id.* at 34,302 n.21, 34,326 n.230. The Commission agreed that internal reporting systems "are essential sources of information for companies about misconduct," and therefore "play an important role in facilitating compliance with the securities laws." *Id.* at 34,323, 34,325. Among other benefits, "[s]creening allegations through internal compliance programs may limit [meritless] claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently." *Id.* at 34,359 n.450.

"[W]histleblower reporting through internal compliance procedures can [thereby] complement or otherwise appreciably enhance * * * enforcement efforts," without substituting for them. 76 Fed. Reg. at 34,359 n.450. All this faciliates efficient use of private-sector and government resources, and effectuates Section 78u-6's design to prevent fraud and other securities-law violations. Reading the anti-retaliation provisions to protect only those who report to the Commission, by contrast, would "defeat the purpose of the legislation." *Philko*, 462 U.S. at 412. "A statutory definition should not be applied in such a manner." *Ibid.*

3. Petitioner argues that giving "whistleblower" its ordinary meaning in Section 78u-6's anti-retaliation provisions would render Sarbanes-Oxley "effectively obsolete." Pet. Br. 29; see *id.* at 26-30. But as noted above, Dodd-Frank's legislative history makes clear

that Congress viewed Sarbanes-Oxley as inadequate and wanted to strengthen its protections. See pp. 2, 27-28 *supra*. The statute that Congress enacted reflects that objective. Clause (iii) cross-references the entirety of Sarbanes-Oxley, which necessarily (and intentionally) creates substantive overlap between the two statutes. But the remedial provisions of Section 78u-6 differ from those in Sarbanes-Oxley in important ways, including through a longer statute of limitations, potentially greater back pay, and no administrative-exhaustion requirement. Compare 15 U.S.C. 78u-6(h)(1)(B)(i), (ii), and (C)(iii), with 18 U.S.C. 1514A(b)(1), (c)(2)(B) and (D).

At the same time, Section 78u-6 preserves Sarbanes-Oxley's remedial scheme, see 15 U.S.C. 78u-6(h)(3), which offers its own advantages. *First*, under Sarbanes-Oxley, the DOL administers initial review and investigates claims—a process that can be less costly and stressful than federal-court litigation, particularly for whistleblowers who lack counsel. See 18 U.S.C. 1514A(b)(2); 29 C.F.R. 1980.103-.110, 1980.114. *Second*, Sarbanes-Oxley authorizes a court to award "all relief necessary to make the employee whole," including compensation for special damages such as emotional injuries. 18 U.S.C. 1514A(c)(1) and (2)(C); see also, *e.g.*, *Jones* v. *SouthPeak Interactive Corp.*, 777 F.3d 658, 663 (4th Cir. 2015). *Third*, unlike Section 78u-6, Sarbanes-Oxley now expressly prohibits predispute arbitration agreements, compare 18 U.S.C. 1514A(e), with, *e.g.*, *Khazin* v. *TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014), and thus could attract whistleblowers who are subject to such agreements. From Fiscal Year 2009 (the year before Section 78u-6's enactment) to Fiscal Year 2016, the annual number of Sarbanes-Oxley

complaints filed with DOL declined by less than 25%. See DOL, *Whistleblower Investigation Data FY2006-FY2016*, https://www.whistleblowers.gov/3DCharts-FY2006-FY2016.pdf. Sarbanes-Oxley thus continues to provide whistleblowers important protections against unlawful retaliation, even after Section 78u-6's enactment.

C. The Commission's Reasonable Interpretation Of Section 78u-6(h)(1) Warrants Judicial Deference

The court of appeals ruled for respondent primarily on the ground that respondent's reading of the statute is correct. Pet. App. 8a. Other courts that have ruled for whistleblowers in respondent's position have done the same. See, *e.g.*, *Bussing*, 20 F. Supp. 3d at 733 ("the result flows from the statute itself"). As an alternative ground for its decision, the court of appeals found the statute ambiguous and deferred to the Commission's reasonable interpretation under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a; accord *Berman*, 801 F.3d at 155 (deferring under *Chevron* because, "at a minimum," the statute is ambiguous and the Commission's interpretation is reasonable). That alternative approach would be appropriate here as well. The Commission's consistent, reasonable, and well-explained formal interpretation warrants *Chevron* deference and should be upheld.

1. When "a statute leaves a gap or is ambiguous," this Court "typically interpret[s] it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2134, 2142 (2016). If the Court concludes that Dodd-Frank is ambiguous with respect to the question presented here, the

Court should defer to the Commission's reasonable resolution of that ambiguity. See *Duke Energy*, 549 U.S. at 576 (deferring to "customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term"); *Cleveland Indians*, 532 U.S. at 218-220 (deferring to agency interpretation of statutorily defined term to have different meanings in different parts of statute); *Robinson*, 519 U.S. at 345-346 (same); cf. *Kasten*, 563 U.S. at 14-16 (deferring to agency interpretation of ambiguity in anti-retaliation provision).

The Commission promulgated Rule 21F-2, 17 C.F.R. 240.21F-2, pursuant to an express conferral of rulemaking authority, 15 U.S.C. 78u-6(j), and through notice-and-comment procedures, see 76 Fed. Reg. at 34,300. The Commission issued the rule less than a year after Dodd-Frank was enacted, *ibid.*, and the agency's interpretation has not changed. The Court should accordingly defer to the Commission's interpretation as a reasonable reading of the pertinent statutory language. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001).

Rule 21F-2 states that, for purposes of Dodd-Frank's anti-retaliation provisions, "you are a whistleblower" if, as relevant here, "[y]ou provide [the relevant] information in a manner described in" 15 U.S.C. 78u-6(h)(1)(A). 17 C.F.R. 240.21F-2(b)(1)(ii).[16] The rule thus

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[16] In addition, by stating that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award," Rule 21F-2(b)(1) establishes that an individual can be protected from unlawful retaliation even if he has not reported alleged wrongdoing to the Commission, or if he has reported it to the Commission through means other than those required for award eligibility. 17 C.F.R. 240.21F-2(b)(1)(iii).

declares a person to be a "whistleblower" under Section 78u-6(h)(1)(A) if he makes any of the disclosures that Section 78u-6(h)(1)(A) describes. That reading comports with usual understandings of the term "whistleblower." The Commission thoroughly explained that its interpretation reflects the underlying statutory objectives to provide broad protection for internal and external whistleblowers alike, to encourage corporate managers to address potential violations in the first instance, and to use government enforcement resources as efficiently as possible. 76 Fed. Reg. at 34,323-34,326.

To be sure, for purposes of Section 78u-6(h)(1)'s anti-retaliation provisions, Rule 21F-2 treats as "whistleblowers" some individuals who do not fall within Section 78u-6(a)(6)'s definition of that term. Under this Court's precedents, however, the Commission was not categorically required to apply that definition in construing every Dodd-Frank provision in which the word "whistleblower" appears. See pp. 17-18, *supra*. Based on the ordinary meaning of the statutory text and various contextual clues, considered in light of the Commission's securities-law expertise, the Commission determined that, although the statutory definition should control the interpretation of Dodd-Frank's award provisions, it was ill-suited to the anti-retaliation provisions. That reasonable interpretation is entitled to deference. Pet. App. 10a; *Berman*, 801 F.3d at 155.

2. Petitioner challenges, for the first time, the procedural validity of the Commission's regulation. Pet. Br. 6-7, 41-45. Petitioner contends that the notice of proposed rulemaking did not adequately alert interested parties that the Commission was contemplating the course it ultimately took, and that the Commission in announcing Rule 21F-2 did not adequately explain its

decision to depart from the statutory definition of "whistleblower." Those challenges are not properly before this Court because they were not pressed or passed on in either of the courts below, see *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 n.2 (2017); see also *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017) (this Court is "a court of review, not of first view") (citation omitted), and because they were "not presented in the petition for certiorari," *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 580 n.3 (2010).

In any event, petitioner's procedural challenges are unfounded. The notice of proposed rulemaking provided ample notice of the Commission's interest in receiving public comment on appropriate measures to protect and promote internal whistleblowing, including through the anti-retaliation provisions.[17] It was therefore "reasonably foreseeable" that the Commission would interpret the anti-retaliation provisions to protect internal whistleblowing. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 175 (2007). And the adopting release's multi-page analysis and comment citations fully explained the regulation's consistency with the statute.[18] See *ibid.* (finding less-developed explanation sufficient).

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[17] See 75 Fed. Reg. 70,488, 70,495, 70,511 & q.42 (Nov. 17, 2010) (soliciting comment on whether and how to promulgate rules interpreting Section 78u-6(h)(1); whether to adopt a "broadened" application of Section 78u-6(h)(1); and whether other proposed rules "provide sufficient incentives" to use internal compliance processes or whether to adopt further rules to "promote effective self-policing and self-reporting ... consistent with [Section 21F's] goals and text").

[18] See 76 Fed. Reg. at 34,302-34,304 & nn.21, 23, 37-39; *id.* at 34,317 n.149; *id.* at 34,323-34,327, n.207, 230; *id.* at 34,359-34,362 & nn.449-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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450 (analyzing "[s]pecifically" how clause (iii) "incorporate[s]" statutory disclosures to non-Commission recipients and does not make protection from job-related retaliation contingent on eligibility for an award; and discussing, and citing comment letters on, the importance of preserving internal compliance reporting despite award incentives for reporting to the Commission).

APPENDIX

1. 15 U.S.C. 78u-6 provides:

Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund

The term "Fund" means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term "original information" means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term "monetary sanctions", when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term "related action", when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission—

(i) shall take into consideration—

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determi-

nation made by the Commission in accordance with section 706 of title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the "Securities and Exchange Commission Investor Protection Fund".

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 78d(i) of this title.

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to—

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to

victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

(A) the whistleblower award program, established under this section, including—

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including—

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employ-

ment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-l(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower—

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

2. 18 U.S.C. 1514A provides:

Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

---

[1] So in original. Another closing parenthesis probably should precede the comma.

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or

condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

3. 15 U.S.C. 78j-1 provides in pertinent part:

Audit requirements

* * * * *

(b) Required response to audit discoveries

(1) Investigation and report to management

If, in the course of conducting an audit pursuant to this chapter to which subsection (a) of this section applies, the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(A)(i) determine whether it is likely that an illegal act has occurred; and

(ii) if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary

effects, such as fines, penalties, and damages; and

(B) as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.

(2) Response to failure to take remedial action

If, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of the firm in the course of the audit of such firm, the registered public accounting firm concludes that—

(A) the illegal act has a material effect on the financial statements of the issuer;

(B) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act; and

(C) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor, when made, or warrant resignation from the audit engagement;

the registered public accounting firm shall, as soon as practicable, directly report its conclusions to the board of directors.

(3) Notice to Commission; response to failure to notify

An issuer whose board of directors receives a report under paragraph (2) shall inform the Commission by notice not later than 1 business day after the receipt of such report and shall furnish the registered public accounting firm making such report with a copy of the notice furnished to the Commission. If the registered public accounting firm fails to receive a copy of the notice before the expiration of the required 1-business-day period, the registered public accounting firm shall—

(A) resign from the engagement; or

(B) furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than 1 business day following such failure to receive notice.

(4) Report after resignation

If a registered public accounting firm resigns from an engagement under paragraph (3)(A), the firm shall, not later than 1 business day following the failure by the issuer to notify the Commission under paragraph (3), furnish to the Commission a copy of the report of the firm (or the documentation of any oral report given).

* * * * *

(m) Standards relating to audit committees

(1) Commission rules

(A) In general

Effective not later than 270 days after July 30, 2002, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

(B) Opportunity to cure defects

The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

(2) Responsibilities relating to registered public accounting firms

The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

(3) Independence

(A) In general

Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

(B) Criteria

In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

(ii) be an affiliated person of the issuer or any subsidiary thereof.

(C) Exemption authority

The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

(4) Complaints

Each audit committee shall establish procedures for—

(A) the receipt, retention, and treatment of complaints received by the issuer regarding ac-

counting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(5) Authority to engage advisers

Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(6) Funding

Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

(B) to any advisers employed by the audit committee under paragraph (5).

4. 15 U.S.C. 7245 provides:

Rules of professional responsibility for attorneys

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

5. 18 U.S.C. 1513(e) provides:

Retaliating against a witness, victim, or an informant

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

6. 17 C.F.R. 240.21F-2 provides:

Whistleblower status and retaliation protection.

(a) *Definition of a whistleblower.* (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

(b) *Prohibition against retaliation.* (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

7. 17 C.F.R. 240.21F-9 provides:

Procedures for submitting original information.

(a) To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u-6(h)), you must submit your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission's Web site located at *http://www.sec.gov;* or

(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in §249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549-5631, Fax (703) 813-9322.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1) or (2) of this section that your information is true and correct to the best of your knowledge and belief.

(c) Notwithstanding paragraphs (a) and (b) of this section, if you are providing your original information to the Commission anonymously, then your attorney

must submit your information on your behalf pursuant to the procedures specified in paragraph (a) of this section. Prior to your attorney's submission, you must provide your attorney with a completed Form TCR (referenced in §249.1800 of this chapter) that you have signed under penalty of perjury. When your attorney makes her submission on your behalf, your attorney will be required to certify that he or she:

(1) Has verified your identity;

(2) Has reviewed your completed and signed Form TCR (referenced in §249.1800 of this chapter) for completeness and accuracy and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief;

(3) Has obtained your non-waivable consent to provide the Commission with your original completed and signed Form TCR (referenced in §249.1800 of this chapter) in the event that the Commission requests it due to concerns that you may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and

(4) Consents to be legally obligated to provide the signed Form TCR (referenced in § 249.1800 of this chapter) within seven (7) calendar days of receiving such request from the Commission.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date

of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section. If you were an anonymous whistleblower, however, you must provide your attorney with a completed and signed copy of Form TCR (referenced in §249.1800 of this chapter) within 60 days of the effective date of these rules, your attorney must retain the signed form in his or her records, and you must provide of copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to you in connection with your submission. Notwithstanding the foregoing, you must follow the procedures and conditions for making a claim for a whistleblower award described in §§ 240.21F-10 and 240.21F-11 of this chapter.

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
AUG 31 2017
OFFICE OF THE CLERK

No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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August 31, 2017

QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside of the statute's definition of a "whistleblower."

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. In 1989, Cato established the Center for Constitutional Studies to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns how courts approach administrative rulemaking, a core check-and-balance mechanism in our separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with the petitioner that the statutory text of the Dodd-Frank Act is unambiguous and thus forecloses respondent's claim. *See* Pet. Brief at 16-30. This brief will focus on why the Court should not grant *Chevron* deference to the Securities and Exchange Commission's interpretation of that Act even if it finds the statutory text ambiguous: The SEC ignored a basic tenet of administrative due process and violated the Administrative Procedure Act (APA) when it failed to provide fair notice to the public that it would redefine—and thus expand—the definition of "whistleblower" in its final rule.

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[1] Rule 37 statement: All parties lodged blanket consents and received timely notice of *amicus*'s intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Dodd-Frank defines a "whistleblower" as an "individual who provides . . . information relating to a violation of the securities laws *to the [Securities and Exchange] Commission.*" 15 U.S.C. 78u-6(a)(6) (emphasis added). The Act then protects a "whistleblower" from retaliation if that person reports a violation of certain laws—including the Sarbanes-Oxley Act of 2002—to a supervisor, agency, or Congress. 15 U.S.C. 78u-6(h)(1)(A). This statute is clear: If a person reports a violation of the covered laws to the SEC, Dodd-Frank provides them a remedy to protect themselves from retaliating employers. *See* Pet. Brief at 16-30.

In 2010 the SEC agreed. In its Notice of Proposed Rulemaking (NPRM), the SEC defined "whistleblower" in line with the statutory definition: "You are a whistleblower if, alone or jointly with others, you provide *the Commission* with information relating to a potential violation of the securities laws." *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added); Pet. Brief at 41. So far, so good. The SEC's NPRM did not try to change the statute's definition, it did not indicate that it was contemplating doing so, nor did it ask for comments on whether it should. Indeed, there was no mention at all that it would expand the statute's meaning as to who qualifies as a "whistleblower."

When the SEC promulgated its final rule in 2011, however, something was different: The SEC expanded the definition of "whistleblower" (for anti-retaliation purposes) to cover people—including the respondent—who do not report a violation of the relevant securities laws to the SEC, so long as he or she has undertaken

the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A). 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011); Pet. Brief at 42. The SEC did not try and explain why it was changing the definition in its final rule, nor did it cite to any public comment that led it to do so. It merely announced that it was expanding the definition of "whistleblower" to reach those who do not report covered securities violations to the SEC. Pet. Brief at 43.

The APA's notice-and-comment procedures simply don't allow the SEC to do this. The APA requires an agency conducting notice-and-comment rulemaking to provide the public with "fair notice" of what will be, or might be, included in its final regulation. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 174 (2007) (citations omitted). As noted, there was nothing in the SEC's NPRM that would give any notice—let alone "fair notice"—to the public that it was going to change whom Dodd-Frank would protect from retaliation.

This Court reaffirmed in *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117 (2016), that procedurally deficient rules that violate the APA do not receive *Chevron* deference because they lack the "force of law." The SEC regulation here violated the APA by not giving the public fair notice that it was contemplating expanding the definition of "whistleblower" in its final rule. The regulation thus does not have the force of law and does not qualify for *Chevron* deference.

The APA serves as a vital procedural check on an ever-growing administrative state. When agencies like the SEC flout these important administrative due process provisions, the Court should not reward them with *Chevron* deference.

ARGUMENT:

THE GOVERNMENT'S REGULATION IS PROCEDURALLY DEFECTIVE AND THUS DOES NOT MERIT *CHEVRON* DEFERENCE

A. The SEC Regulation Violated the APA When It Failed to Give the Public Fair Notice in Its Notice of Proposed Rulemaking

The APA requires, with limited exceptions, agencies conducting notice-and-comment rulemaking to publish a notice of proposed rulemaking in the federal register and, among other things, include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This in turn allows interested parties and the public to comment on the rule. *Id.* at 553(c). Once the comment process is complete, the agency then publishes a final rule incorporating—or not—input that it received during the comment period. *Id.* Within this procedural scheme, the agency's final rule must be the "logical outgrowth" of the proposed rule. *Long Island Care at Home, Ltd.*, 551 U.S., at 174. "In short," this Court has held, the rule is one of "fair notice." *Id.*

While this Court has had limited opportunity to address the contours of what constitutes a logical outgrowth, many of the circuit courts—most often the D.C. Circuit—have established a framework for when notice will be fair and adequate. This framework takes into consideration both an agency's need for flexibility in adapting proposed rules into final rules, and the regulated public's administrative due process rights guaranteed by the APA.

Accordingly, an agency's "final rule need not match the rule proposed" completely, because "[a]gencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration[.]" *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (citations omitted). But there are limits to how far an agency can deviate from its proposed rule. Indeed, if that were not so, the agency would have "carte blanche to establish a rule contrary to its original proposal." *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

A court should thus consider whether "the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed. The adequacy of the notice depends . . . on whether the final rule is a logical outgrowth of the proposed rule." *Kooritzky*, 17 F.3d, at 1513 (cleaned up). In other words, "the logical outgrowth formulation may be merely another way of asking 'how much notice is enough.'" *Id.* (citation omitted).

The circuit courts have described how much notice is enough in various ways. *See, e.g., Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("[W]e have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities."); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) ("A rule is deemed a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."); *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) ("[A]n unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should

have anticipated. Interested parties cannot be expected to divine the EPA's unspoken thoughts.") (citation omitted); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986) ("The test that has been set forth is whether the agency's notice would fairly apprise interested persons of the subjects and issues [of the rulemaking].") (cleaned up).

Drawing from circuit court opinions in *Long Island Care*, this Court boiled the test down to one of "reasonable foreseeability." *See Long Island Care at Home, Ltd.*, 551 U.S., at 175. In that case, the Court had to decide whether the Labor Department gave fair and adequate notice when it issued a regulation exempting certain domestic service employees from provisions of the Fair Labor Standards Act. In holding that it did, the Court reasoned that because the agency "*consider[ed]* not exempting some of those employees in its notice, but ultimately decided to leave them exempt, it had given reasonable, foreseeable notice to the public. *Id.* (emphasis in the original). Thus, if the agency addresses the subject matter in some fashion in its NPRM, the court reasoned, that is enough to provide the public fair and adequate notice. *See id.*

Nevertheless, no matter what might constitute fair notice, it was not present here. The SEC's NPRM did not give any consideration to changing the statutory definition. As noted above, it gave regulated parties no notice—indeed, no indication at all—that it was going to expand the definition of "whistleblower." Pet. Brief at 42. There is simply no argument that silence in an NPRM constitutes "reasonable, foreseeable" notice. Indeed, as one court has held: "something is not a logical outgrowth of nothing." *Kooritzky*, 17 F.3d at 1513.

The SEC's final rule was therefore not a logical outgrowth of its NPRM and thus did not give the public fair notice. This is a violation of the APA.

B. The SEC Regulation Violated the APA and Thus Should Not Get *Chevron* Deference

This Court does not defer to agency regulations that do not meet certain threshold requirements. One requirement, of course, is that it must meet the familiar two-step *Chevron* analysis: the statute must be ambiguous and the agency's interpretation must be reasonable. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-844 (1984).

Another requirement is that the agency issues its regulation in a way that carries the force of law. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

An agency can typically satisfy this force-of-law requirement by promulgating a rule through notice-and-comment rulemaking. When Congress delegates the power to promulgate rules through "notice-and-comment rulemaking, that relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law, so *Chevron* should apply." *Navarro*, 136 S. Ct. at 2125.

Simply going through the motions of notice-and-comment, however, is not enough. The agency must

also follow the proper procedure before a court will invoke *Chevron*. *Id.* This Court explicitly held as much two terms ago in *Navarro*: *Chevron* deference will not apply "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Id.* (citing *Mead Corp.*, 533 U.S., at 227); *see also, Long Island Care at Home, Ltd.*, 551 U.S. at 174-176 (granting *Chevron* deference where an agency's regulation procedure was not defective).

This is for a good reason: If Congress has instructed the agency to go through this process, but the agency ignores that command, then it is not acting within its statutory mandate and thus is not acting with the force of law. *See Navarro*, 136 S. Ct. 2117, at 2127; *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act.") (footnote and citations omitted); *see also*, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 886 (2001) (noting that "the APA and due process law demand compliance with these [APA] procedures before agencies can take action that binds the public with the force of law.").

For example, imagine Congress has delegated an agency like the SEC authority to execute a statute through notice-and-comment rulemaking. The agency promulgates a proposed regulation on a giant banner and flies that banner across the United States. The regulation is interpreting an ambiguous statutory provision. If that agency then claimed its interpretation on the banner warranted *Chevron* deference after it publishes its final rule, this Court—and hopefully any

court—would strike the regulation down in a heartbeat. But why would it do so? Congress has delegated authority to the agency to fill gaps in the statute and the statute is ambiguous. Imagine, too, that the interpretation promulgated on the banner is reasonable and fully explained why it was adopting the regulation. The banner asks for comments on its interpretation, and gives a website where the public can do so as well. Despite meeting most of the *Chevron* benchmarks, no court would give the regulation *Chevron* deference because it did not follow proper APA procedure and thus lacked the force of law.[2]

For the very same reason that the above banner regulation would not get *Chevron* deference, the SEC's regulation should not either: The SEC's regulation expanding the "whistleblower" definition in Dodd-Frank did not follow proper APA notice-and-comment procedure and thus does not have the force of law. *See Navarro*, 136 S. Ct. at 2125.

C. Withholding Deference When Rules Do Not Follow Proper Procedure is Essential For Administrative Due Process

The number of books, law review articles, and judicial opinions questioning the constitutional foundations of the modern administrative state could fill a small library. It is well known that many observers, including members of this Court, believe that the modern administrative state is in tension with—if it does

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[2] *See also*, Michael Pollack and Daniel Hemel, *Chevron Step .5*, Yale J. on Reg.: Notice & Comment (2016), http://bit.ly/2wDMKJH (using a similar example of writing a regulation on napkin and nailing it to the White House door).

not outright subvert—the Framers' constitutional design. *See e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).[3]

What's more, executive agencies now exercise authority over nearly—if not all—"economic, social, and political activities" in this country in some form or fashion. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878, (2013) (Roberts, C.J., dissenting). This development has resulted in a bloated administrative state that "would leave [the Framers] rubbing their eyes." *Id.* (citation omitted). Indeed, the economic and social consequences are vast. By some estimates, the administrative state costs the economy well over a trillion dollars every year. *See generally* Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (last visited Aug. 21. 2017), http://bit.ly/2wEf4vL (estimating the cost of regulatory compliance and economic impact of federal intervention at $1.9 trillion annually).

Chevron is a big reason for this expansion. When applied, *Chevron* deference "is a powerful weapon" for agencies to use. *See City of Arlington*, 133 S. Ct., 1879. Indeed, *Chevron* is "strong medicine . . . requir[ing] courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible." Merrill & Hickman, *Chevron's Domain*, 89 Geo. L.J. at 859.

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[3] *See also generally Egan v. Del. River Port Auth.*, 851 F.3d 263, 278-283 (3rd Cir. 2017) (Jordan J., concurring); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Philip Hamburger, Is Administrative Law Unlawful? (2014).

But *Chevron* is still this Court's precedent. That makes it imperative that the Court police administrative agencies when they do not follow the rules Congress has mandated. Congress recognized long ago the dangers of an unchecked executive branch when it passed the APA. At bottom, the APA supplements the Constitution's procedural due process provisions to protect the regulated public from overreaching government. Indeed, it is "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government." Administrative Procedure Act: Legislative History, S. Doc. No. 298, 79th Cong., 2d Sess. 76 (1946). As then-Justice William Rehnquist described it: The APA is a "basic and comprehensive regulation of procedures . . . a legislative enactment which settled long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (citation omitted); *see also*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982) (the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.").

More specifically, the APA's procedural requirement that agencies go through notice-and-comment rulemaking is one of the most fundamental protections the people have against an overreaching executive. *See id.*; *see also*, George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1653 (1996) (noting the notice-and-comment provision "is the most important change the APA imposes on agency practice").

Indeed, the connection between congressional delegation to a federal agency to "act with the force of law and the existence of rights of public participation is not accidental." *Merrill & Hickman, Chevron's Domain*, 89 Geo. L.J. at 886. Public participation is one of the essential normative reasons why delegations from Congress to executive agencies are tolerated. *See id.*

Fair notice, moreover, is an essential part of what makes the APA's notice-and-comment procedures an effective check on the executive branch. As this Court has noted in other contexts: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted). *See also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("[A]gencies should provide regulated parties 'fair warning' of the conduct [a regulation] prohibits or requires.") (quotation marks and citation omitted). This concept is just as important for administrative due process when the agencies are making the laws that will bind the public. Thus, as long as *Chevron* is precedent, it is essential for "democratic governance and traditions of due process" that this Court demand the public is "heard before they are subjected to the coercive power of the state." *See id.*

This Court has recognized before the APA's importance as a check on administrative governance, and on "administrators whose zeal might otherwise [carry] them to excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (citing *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)) (Scalia, J., concurring). It should continue to do so here.

Accordingly, even if the Court finds the relevant Dodd-Frank provision ambiguous, it shouldn't give *Chevron* deference to the SEC's regulation.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, the decision below should be reversed.

Respectfully submitted,

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August 31, 2017

RECORD
AND
BRIEFS

No. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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Senate Report No. 111-176 (2010) 9, 16, 18

OTHER AUTHORITIES

Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) 3

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IN THE

Supreme Court of the United States

No. 16-1276

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

Many of CWC's member companies are publicly traded corporations subject to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. § 78u-6, and thus are potential respondents to whistleblower retaliation complaints filed under Section 922(a) of the Act. They also are subject to the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745, as well as varying levels of regulation and enforcement by federal government agencies.

For instance, all of CWC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimina-

tion in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Many CWC members also are federal government contractors subject to the affirmative action requirements of Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and its implementing regulations under 41 C.F.R. ch. 60, as well as Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs. Each of these laws contains express or implied workplace retaliation protections.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that the anti-retaliation protections contained in Section 922(a) of Dodd-Frank, 15 U.S.C. § 78u-6(h)(1)(A), cover individuals who complain internally to their employers about securities law violations, but never communicate those concerns externally to the Securities and Exchange Commission (SEC). Petitioner contends, correctly, that because Section 922(a)'s plain text clearly and unambiguously defines "whistleblower" to include only employees who report potential securities law violations to the SEC, the decision below cannot stand. This Court's resolution

of whether an employee who only reports alleged violations internally, and not externally to the SEC, has a cause of action for retaliation under Section 922(a) will have substantial legal and practical impacts on all publicly traded corporations subject to Dodd-Frank.

CWC has participated in numerous cases addressing the scope of federal workplace anti-retaliation statutes. See, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent worked as a vice president of portfolio management for Petitioner, a real estate investment trust that owns, acquires, and develops data centers. Pet. App. 14a. Prior to the termination of his employment in April 2014, Respondent allegedly made several reports internally to senior management regarding possible securities law violations, including accusing his supervisor of eliminating certain internal controls required by the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107–204, 116 Stat. 745, and engaging in other misconduct. *Id.* It is undisputed that Respondent never reported this information to the Securities and Exchange Commission (SEC). Pet. App. 15a.

Respondent sued Petitioner in federal court, accusing the company of violating the Dodd-Frank Wall

Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, by firing him for complaining internally about alleged SOX violations. Pet. App. 12a-13a. Petitioner moved to dismiss the action on the ground that Respondent is not a "whistleblower" as that term is defined in Section 922(a) of Dodd-Frank, because he only complained about the alleged securities law violations internally, and not externally to the SEC. Pet. App. 17a.

The district court denied the motion. Pet. App. 13a. It found that the definition of "whistleblower" in Section 922(a) of Dodd-Frank is inconsistent with the Section's anti-retaliation provision, which protects not only SEC complainants but also individuals who "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 ... and any other law, rule, or regulation subject to the jurisdiction of the Commission." Pet. App. 6a (citation omitted). Unable to reconcile the two, the trial court deferred to the SEC's interpretation that Section 922(a)'s anti-retaliation protection extends to an employee who makes an internal complaint but fails to report to the SEC (and thus does not meet the statutory definition of "whistleblower"). Pet. App. 41a-43a. Recognizing that there is a "serious split in authority" on this issue, however, the trial court certified its order for interlocutory review by the Ninth Circuit. Pet. Cert. 7.

On Petitioner's interlocutory appeal, a divided Ninth Circuit panel affirmed. Pet. App. 3a. Like the trial court, the Ninth Circuit accorded great deference to the SEC's view that despite the narrow definition of whistleblower in Section 922(a), its anti-retaliation provision should be interpreted broadly to extend to employees who make internal complaints but never report to the SEC. Pet. App. 10a-11a. Petitioner filed

a Petition for Writ of Certiorari, which this Court granted on June 26, 2017.

SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly held that Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(h)(1)(A), protects individuals from retaliation when they report an alleged securities law violation internally, but not externally to the Securities and Exchange Commission (SEC). It accorded undue deference to the SEC's interpretation based on its belief that the statute is ambiguous as to the scope and meaning of the term "whistleblower." To the contrary, the statutory language is clear and unambiguous; it only protects "whistleblowers," defined as only those who report securities violations directly to the SEC, including through the filing of certain financial and other disclosures under the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A.

Congress has enacted numerous federal laws that provide broad protections to individuals who blow the whistle on corporate misconduct. It adopted a markedly more restrictive approach in Dodd-Frank, limiting its scope to narrowly defined "whistleblowers." Congress consciously and deliberately chose not to do in Dodd-Frank what it has done in numerous federal laws containing expansive anti-retaliation protections for individuals who blow the whistle on corporate misconduct.

Even if this Court were to find that Dodd-Frank's anti-retaliation provision is ambiguous, controlling deference to the SEC's interpretation would be unwarranted. Specifically, the SEC published a final rule fundamentally altering the statutory definition of

whistleblower, without providing the public with prior notice or an opportunity to comment on its interpretation. This Court has held that such rules are interpretive, not legislative, and therefore are not entitled to *Chevron* deference. Nor is deference warranted under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because the SEC's interpretation is not persuasive or well-reasoned and, in fact, conflicts directly with the statute's plain text.

Finally, allowing the Ninth Circuit's interpretation to stand would significantly burden employers by substantially increasing the likelihood of having to defend themselves simultaneously in multiple, duplicative whistleblower proceedings. Such an interpretation also is unnecessary. Enforcing the anti-retaliation provision as mandated by Congress would in no way harm employees who only report alleged securities law violations internally to their employers, because such activity is expressly protected against retaliation elsewhere, namely under SOX.

ARGUMENT

I. INDIVIDUALS WHO ONLY REPORT ALLEGED SECURITIES VIOLATIONS INTERNALLY TO THEIR EMPLOYER, AND NOT EXTERNALLY TO THE SEC, DO NOT QUALIFY AS "WHISTLEBLOWERS" UNDER SECTION 922(a) OF DODD-FRANK

This case turns on the proper meaning and application of the term "whistleblower" as it is used in the Dodd-Frank Wall Street Reform and Consumer Protection Act's anti-retaliation provision. 15 U.S.C. § 78u-6(h)(1)(A). The Ninth Circuit incorrectly held that individuals who report potential securities

violations internally to their employers only, and not also (or alternatively) to the Securities and Exchange Commission (SEC), are "whistleblowers" entitled to the Act's anti-retaliation protections. Because its holding is contrary to the statutory definition of "whistleblower," which applies only to SEC complainants, the decision below is erroneous and should be reversed.

A. Dodd-Frank's Definition Of Whistleblower Applies Only To Individuals Who Complain Externally To The SEC

Dodd-Frank was passed by Congress in an effort to build upon and enhance protections it put into place in 2002, when it enacted the Sarbanes-Oxley Act (SOX), Pub. L. No. 107-204, 116 Stat. 745, in the wake of several highly-publicized scandals involving fraud at publicly-traded companies, including Enron. Among other things, SOX imposes on publicly traded companies certain corporate responsibility and financial disclosure requirements. Section 806(a) of SOX created 18 U.S.C. § 1514A, which established a new cause of action prohibiting whistleblower retaliation by publicly traded companies against covered individuals who provide information related to certain securities law violations to a federal agency, Congress, or internally to the company.

In 2010, following the financial crisis of 2008, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, which also contained strong anti-retaliation protections for whistleblowers. Section 922(a) defines "whistleblower" as

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, infor-

> mation relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

15 U.S.C. § 78u-6(a)(6). Section 922(a) also provides as follows:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. [§] 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

Congress's goal in enacting Section 922(a) was to establish "a new, robust whistleblower program designed to motivate people who know of securities law violations *to tell the SEC*." S. Rep. No. 111-176, at 38 (2010) (emphasis added). To that end, Section 922(a) also contains monetary incentives for reporting to the SEC to "motivate potential whistleblowers to

come forward and help the *Government* identify and prosecute fraudsters." *Id.* at 112 (emphasis added). Congress never expressed a need to increase or incentivize *internal* reporting through the creation of Section 922(a) nor did it amend SOX for that purpose.

A "whistleblower" under Section 922(a) is any individual who provides information pertaining to a securities law violation to the SEC. The SEC's regulations establish the procedures whistleblowers must follow in doing so. 17 C.F.R. § 240.21F-9. They provide that "[t]o be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. § 78u-6(h)), you must submit your information about a possible securities law violation" either through the SEC's website or by mail or fax to the SEC Office of the Whistleblower using a specific SEC form. *Id.*

B. Only Whistleblowers May Invoke Section 922(a)'s Anti-Retaliation Protections

Proper interpretation of Dodd-Frank's anti-retaliation provision "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The "cardinal principle" of statutory interpretation is that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citations and internal quotations omitted). Accordingly, the definitions and anti-retaliation sections must be read together for Section 922(a) as a whole to make any sense.

The anti-retaliation provision provides that "[n]o employer may discharge ... or in any other manner discriminate against, a *whistleblower* ... because of

any lawful act done by the *whistleblower* ...." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). As is evident from its title, *Securities whistleblower incentives and protection*, this provision protects a "whistleblower" who engages in any of the three types of conduct articulated in the statute. If an individual does not qualify as a whistleblower, the inquiry should end there. See *Asadi v. G.E. Energy (USA), LLC.*, 720 F.3d 620 (5th Cir. 2013) (finding that only individuals who provide information to the SEC qualify as whistleblowers and are protected under the anti-retaliation provision in Section 922(a)).

The term "whistleblower" is used not once but twice in the anti-retaliation provision.[2] If Congress intended to extend anti-retaliation protections expansively to include individuals other than statutory "whistleblowers," it would have, and in other contexts explicitly has, used different terminology. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (protecting any employee or applicant who "opposes any practice" from retaliation). See infra Section I.C. Congress chose not to do so here. Accordingly, the anti-retaliation provision's scope is limited by the statutory definition of whistleblower. See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading the same term used in different parts of the same Act to have the same meaning).

The Ninth Circuit concluded that the third clause of Section 922(a) confers anti-retaliation protections upon a whole class of employees who do not meet the statutory definition of "whistleblower." But subsec-

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[2] The term "whistleblower" also is used elsewhere throughout Section 922(a). See, e.g., 15 U.S.C. §§ 78u-6(b)(1), 78u-6(c)(1)(B), 78u-6(c)(2), 78u-6(d), 78u-6(e), 78u-6(g)(2)(A), 78u-6(g)(5), 78u-6(h), and 78u-6(i).

tion (iii) only protects "whistleblowers" who make "disclosures" that are "protected or required" by SOX. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. SOX outlines a variety of disclosures that are required or protected, including a code of ethics disclosure, 15 U.S.C. § 7264, disclosure that the company's audit committee includes a financial expert, 15 U.S.C. § 7265, conflict of interest disclosures, 15 U.S.C. § 78o-6(b), and real-time issuer disclosures whenever there is any material change. 15 U.S.C. § 78m. An employee has a statutory obligation to blow the whistle on his company *to the SEC* if he knows that the company has failed or intends to fail to make these required disclosures, and the SEC may initiate, and has pursued, enforcement actions against companies and individuals for failing to make these required disclosures. See, e.g., *In the Matter of BlackRock Advisors, LLC and Bartholomew A. Battista*, File No. 3-16501 (SEC 2015).

Moreover, where an employee reports a securities violation to his company's internal audit committee, then anonymously (unbeknownst to his employer) to the SEC – thus becoming a statutory whistleblower – subsection (iii) provides him with legal recourse if he is fired by his employer because of his internal complaint. In other words, he would qualify as a whistleblower because he reported to the SEC, but he is protected from retaliation under subsection (iii) because he made a required disclosure under SOX to his employer's internal audit committee.

Because the anti-retaliation provision in Section 922(a) only applies to "whistleblowers," defined in the Act as individuals who report alleged securities law violations to the SEC, individuals who only report internally have no cause of action under Dodd-Frank.

C. If Congress Intended To Expand Section 922(a)'s Scope, It Would Have Used Broader Language As It Has In Other Anti-Retaliation Statutes

Where Congress has wanted to extend broader anti-retaliation coverage to cast a wider net of protection, it has expressed that intention in the plain language of the statute. There are more than twenty separate federal laws that provide anti-retaliation protection for corporate whistleblowers. See, e.g., Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; Energy Reorganization Act of 1974, 42 U.S.C. § 5851; FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Federal Railroad Safety Act, 49 U.S.C. § 20109; Federal Water Pollution Control Act, 33 U.S.C. § 1367; International Safe Container Act, 46 U.S.C. § 80507; National Transit Systems Security Act, 6 U.S.C. § 1142; Occupational Safety and Health Act, 29 U.S.C. § 660(c); Pipeline Safety Improvement Act, 49 U.S.C. § 60129; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Seaman's Protection Act, 46 U.S.C. § 2114; Surface Transportation Assistance Act, 49 U.S.C. § 31105; Toxic Substances Control Act, 15 U.S.C. § 2622; and Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. Congress has also protected employees from retaliation under a number of employment law statutes. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Fair Labor Standards Act, 29 U.S.C. § 215; Americans with Disabilities Act, 42 U.S.C. § 12203(a). These wide-ranging whistleblower protections confirm that Congress knows how to draft anti-retaliation language that protects both broad and narrow categories of individuals depending on the intent of the statute in question.

For example, Title VII contains a very broad anti-retaliation provision that provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Thus, Title VII protects from retaliation those who "oppose" discriminatory employment practices, as well as those who file discrimination charges or otherwise "participate" in Title VII investigations, proceedings, or hearings. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009). Likewise, the Americans with Disabilities Act provides:

> No person shall discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a) (emphasis added).

In 2005, Congress amended the Energy Reorganization Act of 1974 to explicitly protect from retaliation employees who file *internal* complaints with their employers. 42 U.S.C. § 5851(a). Here, Congress could have elected to specifically protect employees who file internal complaints, rather than expressly limit-

ing Section 922(a)'s anti-retaliation protections to "whistleblowers" who report only to the SEC.

That Congress acted deliberately is also evident when looking at the anti-retaliation provision contained in Section 1057 of Dodd-Frank. 12 U.S.C. § 5567. Section 1057 protects "any covered employee" who provides information to the government (federal, state, or local) *or internally to his employer* that he reasonably believes constitutes a violation of the Consumer Financial Protection Act of 2010 or any other provision of the law that is subject to the jurisdiction of the Consumer Financial Protection Bureau. 12 U.S.C. § 5567(a)(1). There, Congress chose to protect "any covered employee," including those employees who only complain internally. Despite the fact that both sections are part of the Dodd-Frank Act, Section 922(a)'s anti-retaliation language is more narrow, strongly suggesting that Congress intended to provide different protections in different parts of the Act. See *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen Congress includes particular language in one section of a statute but omits it in another ... this Court presume[s] that Congress intended a difference in meaning") (citation and internal quotations omitted).

D. Congress's Intent To Protect Only Those Who Complain Externally To The SEC Is Evident From Dodd-Frank's History, Structure And Operation

Dodd-Frank plainly was intended to protect (1) "whistleblowers," as so defined, from (2) retaliation for (3) engaging in statutorily protected conduct. That intention is evident, beginning with the title of the provision, "[p]rotection of whistleblowers" and "prohibition against retaliation." See *Fla. Dep't of Revenue*

v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'") (citing *Porter v. Nussle*, 534 U.S. 516, 528 (2002)); cf. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) (finding the statutory headings and titles were not dispositive in this specific instance where, unlike here, the statutory text was more detailed in its coverage than the narrow title of the section). There is no reason or indication to suggest that Congress intended that the anti-retaliation provision, which it included in the same statutory section, use a different definition of whistleblower than the one contained in the definitions section.

1. Dodd-Frank's legislative history confirms that Congress enacted the anti-retaliation protections in Section 922(a) to protect only individuals who report to the SEC

The district court below found, and the Ninth Circuit agreed, that "apart from the definition of whistleblower itself," Pet. App. 37a, the legislative history contains no indication that Congress intended to limit Dodd-Frank's whistleblower protections to external reports. To the contrary, Dodd-Frank's legislative history further confirms that its anti-retaliation protections were intended to extend only to activity related to SEC enforcement.

Indeed, one of the key reasons for establishing the whistleblower protection program in the Dodd-Frank Act was to assist the SEC in identifying securities violations and prevent further financial crises. S. Rep. No. 111-176, at 110 (2010). The legislative history references testimony suggesting that whistleblower tips to the SEC are thirteen times more effective

at uncovering fraud schemes in public companies than routine SEC audits.[3] *Id.* Expanding the anti-retaliation provision to protect individuals who never report to the SEC does nothing to achieve the purpose of the statute – to enhance and focus SEC enforcement efforts.

2. Dodd-Frank's monetary incentives are available only to employees who report both internally to their employers and externally to the SEC

The Ninth Circuit's contention that the language of subsection (iii) reflects a Congressional intent to incorporate all of SOX's protections so as not to leave internal complainants without legal recourse is unfounded. A more sensible reading is that subsection (iii) is intended to confirm that a statutory whistle-blower remains protected from retaliation for raising his concerns internally, even where his employer is unaware of his disclosure to the SEC. It is not hard to imagine a situation where an employee reports anonymously to the SEC and then, frustrated with inaction or bureaucratic delays, complains internally to his employer. In this situation, the employee would meet the definition of a whistleblower under Section 922(a) because he complained to the SEC.

In fact, that a Dodd-Frank whistleblower might also lodge an internal complaint is not uncommon at all.

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[3] In fact, tips to the SEC from Dodd-Frank bounty hunters hit an all time high in fiscal year 2016. The SEC's Office of the Whistleblower received 4,218 whistleblower "tips", up 7.6 percent over fiscal year 2015 and a new all-time high. SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, *available at* https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf (last visited Aug. 30. 2017).

The SEC created several incentives to encourage employees to report both internally and to the SEC. An employee may be eligible for a greater award from the SEC if the employee reports a potential securities law violation internally through his company's reporting procedures, then to the SEC (within 120 days of the internal report), and then the company, unaware of his report, voluntarily self-reports to the SEC. 17 C.F.R. § 240.21F-4(c)(3); 76 Fed. Reg. 34,299 (June 13, 2011). A whistleblower's voluntary participation in the company's internal compliance program is also a factor that can increase the amount of his award. 17 C.F.R. § 240.21F-6(a). On the other hand, if the SEC finds that the whistleblower interfered with internal compliance and reporting, it can use that to decrease the amount of his award. 17 C.F.R. § 240.21F-6(b).

In addition, *amicus* respectfully submits that employees are not shy about accessing internal complaint procedures while also lodging formal complaints with federal regulators. Under Title VII, for instance, an employee alleging discrimination on the basis of race must file an administrative charge with the Equal Employment Opportunity Commission before proceeding to federal court. 42 U.S.C. § 2000e-5. Employees often do so after having first sought a more informal resolution through their employers' dispute resolution mechanism. This is particularly true for current employees who simply seek to resolve their disputes quickly and quietly.

Nevertheless, in enacting Dodd-Frank, Congress recognized that there is substantial risk for an employee to blow the whistle on her employer to the SEC. S. Rep. No. 111-176, at 110 (2010). It is telling that the SEC put into place Dodd-Frank reporting

incentives that do not exist in the SOX context. Along with the potential for an extra reward if the SEC uncovers a violation, there are specific provisions for keeping the reporting employee's name anonymous throughout its proceedings.

Not only is the language of Section 922(a) unambiguous, but the legislative history confirms that Congress's intention was only to protect individuals who report alleged securities law violations to the SEC.

E. Even If This Court Finds That The Statutory Language Is Ambiguous, The SEC's Interpretation Is Not Entitled To Judicial Deference

Even if this Court finds that Section 922(a)'s anti-retaliation protections are not unambiguously limited to "whistleblowers," defined as individuals who report alleged securities law violations to the SEC, the SEC's regulatory interpretation is not entitled to deference because the agency did not properly engage in notice-and-comment rulemaking, and its interpretation is altogether unpersuasive in any event.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established a two-step analysis for analyzing a federal agency's construction of a statute. First, the court will look at whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, effect must be given to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43 (footnote omitted). See also *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted); *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Courts thus must "presume that a legislature says in a

statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

If the court finds the language of the statute is ambiguous, it will examine, under step two, "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Where the agency's construction is unreasonable, *Chevron* authorizes courts to reject it. *Dep't of the Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990) (applying *Chevron* framework and rejecting agency interpretation as "not reasonable"). "[D]eference is not equivalent to acquiescence ...." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). See *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions"); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"), *quoted in Holly Farms Corp. v. NLRB*, 517 U.S. 392, 410 (1996) (O'Connor, J., concurring in the judgment in part and dissenting in part).

Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the

force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). If the regulation is "procedurally defective," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citation omitted), the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Mead Corp.*, 533 U.S. at 221 (citing *Skidmore*). The weight given to the agency's view "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

1. The SEC's Section 922(a) final regulation was not subject to notice-and-comment rulemaking, rendering it unsuitable for *Chevron* deference

In enacting Dodd-Frank, Congress gave the SEC rulemaking authority to implement Section 922(a), which is a "very good indicator" that Congress intended any regulation promulgated pursuant to that authority to carry the force of law. *Mead Corp.*, 533 U.S. at 229-30. Acting on that authority, the SEC on November 3, 2010 published for public comment a proposed rule implementing Dodd-Frank's whistleblower anti-retaliation provision. The proposed rule provided:

> (a) You are a whistleblower if, alone or jointly with others, you provide the Commission with information relating to a potential violation of the securities laws. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

> (b) The retaliation protections afforded to whistleblowers by the provisions of paragraph (h)(1) of Section 21F of the Exchange Act (15 U.S.C. [§] 78u-6(h)(1)) apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 21F, 15 U.S.C. [§] 78u-6(h)(1)(A)(i), the requirement that a whistleblower provide "information to the Commission in accordance" with Section 21F (15 U.S.C. [§] 78u-6) is satisfied if an individual provides information to the Commission that relates to a potential violation of the securities laws.
>
> (c) To be eligible for an award, however, a whistleblower must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

SEC, *Proposed Rules for Implementing the Whistleblower Protections of Section 21F of the Securities and Exchange Act of 1934*, 75 Fed. Reg. 70,487, 70,519 (Nov. 17, 2010). The SEC's proposed rule mirrored the definition of whistleblower in the statute and made clear that a whistleblower was protected from retaliation even if his report to the SEC did not qualify for an award. The SEC gave the public 45 days to comment.

On June 13, 2011, the agency published its final rule, which unlike the earlier proposal provided that individuals who report internally, but not to the SEC, are protected under Section 922(a)'s anti-retaliation provision. SEC, *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,299, 34,300-04, 34,363 (June 13, 2011). The rule went into effect 60

days after it was published in final form, without an opportunity for public comment.[4]

Without explanation, the SEC issued a final rule so different from the language in the proposed rule that it should have been subjected to a period of public notice and comment. Because it was not, it cannot be considered a legislative rule carrying the force and effect of law. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (interpretive rules are "issued ... to advise the public of the agency's construction of the statutes and rules which it administers, do not require notice-and-comment rulemaking, and do not have the force and effect of law") (citations and internal quotations omitted). Accordingly, it is not entitled to controlling deference by this Court.

2. The SEC's regulation is not entitled to *Skidmore* deference because it is inconsistent with the plain language of the statute and otherwise is unpersuasive

In *Skidmore*, this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is

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[4] Following the Fifth Circuit's decision in *Asadi v. G.E. Energy (USA), LLC.*, 720 F.3d 620 (5th Cir. 2013), the SEC again issued interpretative guidance clarifying that Section 922(a)'s anti-retaliation provision covered internal whistleblowers. See SEC, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47,829 (Aug. 10, 2015).

to be accorded to administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; see also *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other." *Mead Corp.*, 533 U.S. at 228 (citations omitted).

As explained above, the SEC's interpretation of Section 922(a) is inconsistent with the plain language of the statute and Congressional intent, and therefore should hold no weight with this Court. Congress has spoken directly to the precise question at issue, both in Section 922(a)'s text and in the title and caption of its anti-retaliation provision. 15 U.S.C. § 78u-6(h)(1)(A). Congress left no "gap" for the agency to fill. Cf. *Chevron*, 467 U.S. at 843. "Where Congress has established a clear line, the agency cannot go beyond it ...." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 133 S. Ct. 1863, 1874 (2013). See also *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42 (1990) (concluding that "[b]ecause we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation") (footnote omitted).

Furthermore, the SEC's interpretation is not consistent with any longstanding agency interpretations,

and in fact contradicts the agency's initial construction as well as its sub-regulatory guidance on its website and elsewhere, regarding what the term "whistleblower" means in this context. On its Office of the Whistleblower webpage, the SEC provides guidance on the scope of Section 922(a).[5] It recognizes that the whistleblower program was established to encourage reporting to the SEC and that there are different protections for individuals who report externally to the SEC under Dodd-Frank, and those who report internally under SOX. In its "Frequently Asked Questions," the SEC addresses the purpose of Dodd-Frank's whistleblower program and an employee's rights if his employer retaliates against him for submitting information to the SEC.[6] The SEC asks the following questions and provides the following answers:

> **What is the SEC Whistleblower Program?**
>
> The Whistleblower Program was created by Congress to provide monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC. ...
>
> The Program also prohibits retaliation by employers against employees who provide us with information about possible securities violations.[7]

* * *

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[5] https://www.sec.gov/about/offices/owb/owb-faq.shtml (last visited Aug. 30, 2017).

[6] *Id.*

[7] https://www.sec.gov/about/offices/owb/owb-faq.shtml#P2_764 (last visited Aug. 30, 2017).

What rights do I have if my employer retaliates against me for submitting information to the SEC?

Employers may not discharge, demote, suspend, harass, or in any way discriminate against you because of any lawful act done by you in providing information to us under the whistleblower program or assisting us in any investigation or proceeding based on the information submitted. If you believe that your employer has wrongfully retaliated against you, you may bring a private action in federal court against your employer. If you prevail, you may be entitled to reinstatement, double back pay, litigation costs, expert witness fees, and attorneys fees. The Commission can also take legal action in an enforcement proceeding against any employer who retaliates against a whistleblower for reporting information to us. See Rule 21 F-2.

Also, under the Sarbanes-Oxley Act, you may be entitled to file a complaint with the Department of Labor if you are retaliated against for reporting possible securities law violations, including making internal reports to your company. For more details please see the OSHA Fact Sheet on filing whistleblower complaints under the Sarbanes-Oxley Act.

SEC, Office of the Whistleblower, Frequently Asked Questions: No. 15.[8] The SEC explains that if an employee is retaliated against for providing information to the SEC or assisting the SEC in any investigation, the employee may bring a private right of action in

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[8] *Available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml#P40_9612 (last visited Aug. 30, 2017).

federal court. 15 U.S.C. § 78u-6(h)(1)(B). It goes on to explain that under SOX, the employee may be entitled to file a complaint with the Department of Labor if he is retaliated against for making an internal report. The SEC does not mention any Dodd-Frank remedies for internal complainants. SEC, Office of the Whistleblower, Frequently Asked Questions: No. 15.[9]

If the Government's head-spinning change in position were accorded any deference, then other agencies would be free to invent, misconstrue, imagine and implement statutory constructions exceeding, perhaps even intentionally, the limitations imposed by Congress itself, and judicial review would be merely a *check-off* rather than a *check*.

II. PERMITTING INTERNAL COMPLAINANTS TO PURSUE A CAUSE OF ACTION UNDER THE DODD-FRANK ACT WOULD PRODUCE UNJUST RESULTS

A. Employees Who File Internal Complaints Already Are Protected By SOX

SOX provides that an employer cannot retaliate against an employee because the employee:

> provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or

---

[9] *Available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml#P40_9612 (last visited Aug. 30, 2017).

> assistance is provided to or the investigation is conducted by –
>
> ***
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover or terminate misconduct) ....

18 U.S.C. § 1514A(a)(1). Unlike Dodd-Frank, SOX explicitly protects whistleblowers who report suspected fraud internally to their employers. Thus, interpreting Dodd-Frank's retaliation protections as limited to those who report suspected violations to the SEC in no way would affect the rights of internal complainants under SOX. It would impose significant hardships on employers, however.

B. Employers Would Face Substantial, Unjustified Burdens If Internal Complainants Were Permitted To File A Cause Of Action Under Section 922(a) Of Dodd-Frank

While permitting internal complainants to invoke Dodd-Frank would be extremely beneficial to the employee, it would expose employers to substantial risk, including the possibility of having to defend one set of allegations simultaneously in three fora with different remedial and enforcement schemes: (1) in federal court, (2) before the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), which has the authority to investigate SOX retaliation complaints, 29 C.F.R. § 1980.104, and (3) before the SEC, which has authority to investigate the underlying alleged securities law violations. 15 U.S.C. § 7215. The monetary cost alone to defend these three actions could be astronomical. But the

employer also likely would face other significant costs, including productivity costs associated with having to prepare for and participate in these investigations and litigation – such as sitting for interviews and depositions, and assisting with responses to discovery requests, motions practice, and conferences.

Consider the following example:

> Mary believes that Company A is engaged in securities fraud and she reports her suspicions to Company A's internal audit committee on October 1, 2015. Two weeks later, Mary is terminated. One week after her termination, Mary reports the alleged securities fraud to the SEC for the first time. Mary believes that she was terminated because of her internal complaint and so she files a charge with OSHA under SOX. In December 2016, OSHA concludes its investigation finding no retaliation by Company A.[10] Mary is not satisfied with this result and files suit in federal court under Dodd-Frank. During this time, her employer has also been subject to an investigation by the SEC.

Mary would not be considered a "whistleblower" under Section 922(a) because she did not report to the SEC before her termination. Under the Ninth Circuit's construction, however, she nevertheless would be entitled to invoke Dodd-Frank's anti-retaliation protections, including waiting up to six years to file a

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[10] Alternatively, if OSHA does not issue a final decision within 180 days after Mary files her complaint, she may file an action in federal court. In that instance, it is conceivable that OSHA could continue to investigate Company A even after Mary has filed a federal lawsuit. See *EEOC v. Union Pac. R.R. Co.*, __ F.3d _ , 2017 WL 3483345 (7th Cir. Aug. 15, 2017).

suit in federal court. On the other hand, Company A could be forced to defend itself in three separate fora: in an OSHA investigation, in federal court under SOX, and Section 922(a) of Dodd-Frank, and in an SEC investigation of Mary's underlying allegations raised after her termination.

If given a choice between the two, most employees would prefer to proceed under Dodd-Frank, which provides no administrative exhaustion requirement, a much longer statute of limitations, and an exponentially higher potential monetary recovery. See 15 U.S.C. § 78u-6(h)(1)(C). This type of forum-shopping could not have been the intent of Congress when it enacted Dodd-Frank.

CONCLUSION

Accordingly, the decision below should be reversed.

Respectfully submitted,

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IN THE

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DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or "Act") in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide.

The interpretation of the Dodd-Frank Act espoused by the Ninth Circuit in this case would greatly expand the number of employees authorized to pursue the enhanced

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1. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no party or party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *Amicus Curiae*, its counsel, and its members made a monetary contribution intended to fund this brief's preparation or submission.

remedies of the Act, and the period of time in which they may sue for alleged retaliation, without yielding the law-enforcement benefits Congress intended when it enacted a "bounty" and heightened protections for persons who complain to the SEC. The carefully crafted procedures established in 2002 in the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") would become largely moot and obsolete under the Ninth Circuit's interpretation, depriving Chamber members of the limitations and protections established by that earlier law.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether an individual who does not meet the definition of "whistleblower" in the Dodd-Frank Act can bring a cause of action under the Act's anti-retaliation provisions. The language of the Act is clear that only a "whistleblower"—defined in the statute as an individual who provides information "to the Commission"—is protected by the anti-retaliation provisions of the Act. 15 U.S.C. § 78u-6(a)(6), (h)(1). Yet, Respondent is asking the Court to expand the meaning of "whistleblower" as used in the anti-retaliation provisions by striking the phrase "to the Commission" from the statutory definition. That is impermissible. *See Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

There are two fundamental reasons why this Court should apply the Act's plain text. First, the definition of "whistleblower" and the subsection of the anti-retaliation provision protecting internal complainants are not in conflict: when read together, the anti-retaliation provision

protects individuals who report information both to the SEC and to their employer and are retaliated against for making the internal report. Respondent, however, tries to flip this structure by using the *conduct* protected in the anti-retaliation provisions to define *who* is a protected whistleblower rather than using the unambiguous definition of "whistleblower" to identify who is protected.

Also, Respondent argues that a plain-text reading of the Dodd-Frank Act would leave auditors and lawyers without a remedy, as the Sarbanes-Oxley Act requires them to report securities violations internally before reporting to the SEC. But the assumption that auditors and lawyers would lack a remedy under the Act because retaliation would occur before they have an opportunity to report to the SEC is unfounded. Indeed, the allegations in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2nd Cir. 2015), *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) and other district court cases show that there often is an appreciable lag in time between an initial internal report and any retaliation. Moreover, auditors and lawyers are already protected from retaliation stemming from internal reports under the Sarbanes-Oxley Act. The Court should not seize on those small classes of claimants to justify the broad, counter-textual reading advocated by Respondent.

Second, Respondent's proposed interpretation undermines the Sarbanes-Oxley Act's administrative scheme, giving claimants who never reported to the SEC discretion and incentives to bypass Sarbanes-Oxley's procedures. The Sarbanes-Oxley Act requires claims to be filed with the U.S. Department of Labor ("DOL") before they may be brought before a district court, but the Dodd-Frank Act enables a plaintiff to file a complaint

directly in district court. Compounding the problem, plaintiffs are apt to forego the Sarbanes-Oxley Act and proceed under the Dodd-Frank Act under Respondent's interpretation because the Dodd-Frank Act provides for twice the amount of backpay as the Sarbanes-Oxley Act and offers a dramatically longer statute of limitations (up to 10 years) than the Sarbanes-Oxley Act (180 days). That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under Section 78u-6.

For these reasons, as discussed in greater detail below, the Chamber respectfully submits that the Court should apply the plain text of the Act.

ARGUMENT

I. The Dodd-Frank Act Unambiguously Requires That A Claimant Have Reported To The SEC To Qualify As A "Whistleblower" Protected By Section 78u-6's Anti-Retaliation Provision

A. The Plain Language Of Section 78u-6 Extends Protection From Retaliation Only To Individuals Who Report To The SEC

The Definition Of Whistleblower In Section 78u-6. The Dodd-Frank Act amended the Securities Exchange

Act of 1934 by adding 15 U.S.C. § 78u-6, which seeks to further enforcement of the securities laws by "motivat[ing] those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud," S. Rep. No. 111-176, at 110 (2010).

Section 78u-6, titled "Securities whistleblower incentives and protection," begins by stating that "*[i]n this section* the following definitions *shall* apply." 15 U.S.C. § 78u-6(a) (emphasis added). Section 78u-6(a) then defines "whistleblower" and uses that defined term throughout Section 78u-6, including the anti-retaliation provision.[2]

Section 78u-6(a) defines "whistleblower" as follows:

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.

Id. § 78u-6(a)(6) (emphasis added).

The foregoing plain language requires the Court to apply this statutory definition of "whistleblower" throughout Section 78u-6.

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2. *See* 15 U.S.C. §§ 78u-6(a)(3)(A)-(C), (a)(5), (b)(1), (c)(1)(B)(i)(I)-(III), (c)(2)(A)-(D), (d)(1), (d)(2)(A)-(B), (e), (g)(2)(A), (g)(5)(A) & (E), (h)(2)(A), (h)(3), & (i).

The Bounty Program In Section 78u-6(b). Within Section 78u-6, the Dodd-Frank Act first creates a bounty award program through which "whistleblowers who voluntarily provided original information to the Commission" can receive between 10 percent and 30 percent of the sanctions recovered by the SEC based on the whistleblower's tip. *Id.* § 78u-6(b). More specifically, Section 78u-6(b) provides:

> In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more *whistleblowers who voluntarily provided original information to the Commission* that led to the successful enforcement of the covered judicial or administrative action, or related action[.]

Id. § 78u-6(b)(1) (emphasis added).

The Anti-Retaliation Protections In Section 78u-6(h). Then, Section 78u-6(h), titled "Protection of whistleblowers," creates protections against retaliation for "whistleblowers," stating:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower* –
>
> (i) in providing information to the Commission in accordance with [Section 78u-6];

> (ii) [for participating] in any investigation or judicial or administrative action of the Commission [that is related to such information]; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201, *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A) (emphasis added).

The definition of "whistleblower" and the anti-retaliation provision should be read together in harmony. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal citations omitted); *Maracich v. Spears*, 133 S. Ct. 2191, 2205 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory . . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.") (alteration and omission in original) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)).

Together, these provisions recognize that employees who report to the Commission may engage in other, related actions for which they will also be protected: an

employee who has made a report to the Commission may be called to testify or assist an investigation related to that information, or may raise the same issue with her employer or exercise other related rights or responsibilities. That employee is protected from retaliation for all these activities, not merely in connection with her initial report.

That employee, however, must be a Dodd-Frank Act "whistleblower." The statute includes an explicit definition" of "whistleblower"—an individual who provides information "to the Commission"—and this Court "must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words").

The surrounding context confirms that the statutory definition of "whistleblower" applies to Section 78u-6(h). It is well established that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947)). The section here is titled "Securities whistleblower incentives and protection," and the relevant subsection is titled, "Protection of whistleblowers." Congress used the term "whistleblower" throughout Section 78u-6, and the Court must give that language effect.

Although this natural and straightforward reading of the Act shows that the "whistleblower" definition in Section 78u-6(a)(6) establishes *who* is protected and the anti-retaliation provision in Section 78u-6(h)(1)(A)

specifies what *actions* taken by that covered person are protected, Respondent tries to flip this structure, using the conduct that is protected to create new definitions of who is protected. But that approach renders the definition of "whistleblower" that Congress created meaningless. As the Fifth Circuit explained:

> Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.

Asadi, 720 F.3d at 625.

Moreover, Respondent's approach reads the words "to the Commission" in the definition of "whistleblower" out of the statute, thus violating the canon of statutory interpretation that no words in a statute shall be treated as superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

B. The Legislative History Confirms The Plain Meaning Of The Statute

The Dodd-Frank Act's legislative history confirms that Section 78u-6 extends protection from retaliation only to individuals who report to the SEC. The House bill initially prohibited retaliation against an "employee, contractor, or agent," but this later was replaced with the narrower prohibition on retaliation against a "whistleblower" that now appears in the Act. *Compare* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(a)(g)(1)(A) (1st Sess., as passed by House, Dec. 11, 2009), *with* Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(a)(h)(1)(A) (2nd Sess., as passed by Senate, May 20, 2010). Had Congress selected the terms "individual" or "employee," then the construction Respondent advances would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee—not just those who qualify as a "whistleblower"—to be protected from retaliatory actions by their employers. *See Asadi*, 720 F.3d at 626-27. But Congress used the term "whistleblower" throughout Section 78u-6 and that purposeful language should be given effect. *Id.*[3]

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3. It is useful to compare the Dodd-Frank Act's whistleblower provision to the Sarbanes-Oxley Act's whistleblower provision. The Sarbanes-Oxley Act prohibits an employer from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an *employee* in the terms and conditions of employment" because of the employee's involvement in certain enumerated protected activities. 18 U.S.C. § 1514A(a) (emphasis added). It is telling indeed that Congress used the term "employee" in the Sarbanes-Oxley Act, while using the limited definition of "whistleblower" in the Dodd-Frank Act.

Further, Congress's use of express language protecting employees who report only to their employer in other sections of the Dodd-Frank Act cautions against interpreting Section 78u-6 to protect such individuals. Title X of the Act, which creates the Consumer Financial Protection Bureau, prohibits an employer from terminating or discriminating against a "covered employee" who has "provided . . . information to the *employer*, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of . . . any rule, order, standard, or prohibition prescribed by the Bureau." 12 U.S.C. § 5567(a)(1) (emphasis added). The fact that Congress used express language protecting employees who report only to their employer in Title X shows that Congress knows how to protect those individuals when it so desires. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another[,]' . . . this Court 'presume[s]' that Congress intended a difference in meaning.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

C. The Court Should Reject The Arguments Advanced By The Second Circuit And The Ninth Circuit

The Second Circuit and the Ninth Circuit advanced a number of justifications for not following the plain text. None of those arguments is persuasive.

First, the lower courts believed that applying the statute's plain terms would leave paragraph (iii) of Section 78u-6(h)(1)(A) with an extremely limited scope, undermining Congress's goal of fostering internal

complaints. This concern is misplaced. Under the statute's plain terms, a whistleblower is protected under paragraph (iii) when he: (1) reports to the SEC, then reports internally and is fired for the internal reporting; (2) simultaneously reports both to the SEC and internally and is fired for either disclosure; or (3) reports internally, then reports to the SEC, then is fired for the internal reporting.

The coverage provided by the Act's plain language in these circumstances cannot be dispelled by the Second Circuit's and Ninth Circuit's speculation that "[e]mployees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally." *See Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1049-50 (9th Cir. 2017); *see also Berman*, 801 F.3d at 152 ("[A]part from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope.").

In fact, highly reliable empirical evidence shows that employees often advance complaints through multiple avenues. Data from the Ethics Resource Center National Business Ethics Survey of the U.S. Workforce indicates that approximately 84 percent of whistleblowers who report a complaint outside of the company do so after reporting internally first. Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 2 (2012). In these and similar circumstances, paragraph (iii) spares courts the trouble of divining whether it was the report to the SEC or the internal complaint that prompted any retaliatory action—if the employee is a statutory

"whistleblower," he is protected regardless which specific complaint prompted the action.[4]

Second, the lower courts relied on *King v. Burwell*, 135 S.Ct. 2480 (2015), for the proposition that "[t]he use of a term in one part of a statute 'may mean [a] different thing[]' in a different part, depending on context." *See Somers*, 850 F.3d at 1049 (quoting *King*, 135 S. Ct. at 2493 n.3); *Berman*, 801 F.3d at 150. But the question presented in this case is not whether one "part" of a statute means the same thing "in a different part" or a "later . . . provision." Rather, it is whether a statutory definition that Congress said "shall apply" in Section 78u-6 applies to a provision falling squarely in that section.

Moreover, applying *King* in the manner suggested by the lower courts would yield a potentially chaotic approach to statutory interpretation, as it would enable courts to rewrite statutory definitions. The dissent in *Somers* warned of this risk in vivid terms. *See Somers*, 850 F.3d at 1051 (Owens, J., dissenting) ("In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level.").

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4. SEC regulations prevent the Commission from revealing the identity of a whistleblower absent narrow extenuating circumstances (17 C.F.R. Part 240.21F-7 (2011)), and nearly a quarter of all award recipients reported to the SEC anonymously through counsel, U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18 (2016). Accordingly, it will often be easier for employees to show that an internal complaint pursuant to paragraph (iii) prompted the allegedly retaliatory action.

Finally, the lower courts claimed that Petitioner's interpretation would leave auditors and lawyers without a remedy, as they are required by the Sarbanes-Oxley Act to report securities violations internally before reporting to the SEC. *See Somers*, 850 F.3d at 1049-50; *Berman*, 801 F.3d at 151-52. This argument is unavailing for several reasons.

As an initial matter, the assumption that auditors and lawyers would lack a remedy under the Act because retaliation would occur before they have an opportunity to report to the SEC is unfounded. The allegations in *Berman* and *Asadi* show that there often is an appreciable lag in time between an initial report and the alleged employment retaliation. In *Berman*, nearly eight months elapsed between the plaintiff's internal complaint and the termination of his employment. *See Berman v. Neo@ Ogilvy LLC*, No. 14-cv-00523, 2014 WL 6865718, at *2-3 (S.D.N.Y. Aug. 15, 2014). And in *Asadi*, approximately one year passed between the plaintiff's internal complaint and the termination of his employment (although plaintiff received a negative performance review in the interim period). *See Asadi*, 720 F.3d at 621. District court cases addressing this issue have involved similar delays. *See, e.g., Dressler v. Lime Energy*, No. 14-cv-07060, 2015 WL 4773326, at *1-2 (D.N.J. Aug. 13, 2015) (plaintiff was not terminated until well over a year after her initial report); *Egan v. TradingScreen, Inc.*, No. 10-cv-8202, 2011 WL 4344067, at *1 (S.D.N.Y. Sept. 12, 2011) (plaintiff was not allegedly retaliated against until nearly eight months after his initial report); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 647-648 (E.D. Tenn. 2015) (plaintiff was not allegedly retaliated against until nearly six months after the company began to suspect that he was reporting externally).

Moreover, lawyers and auditors are not left without protection for internal reporting because they are protected by the Sarbanes-Oxley Act. As the dissent in *Berman* observed, "Congress may well have considered that additional incentives should not be offered to get lawyers and auditors to fulfill existing professional duties, for the same reason reward posters often specify that the police are ineligible." *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting). Lawyers and auditors account for a small portion of Sarbanes-Oxley whistleblower cases; the Court should not seize on those small classes of claimants to justify the broad, counter-textual reading advocated by Respondent.

D. The Court Should Not Defer To The SEC's Rule

In May 2011, the SEC issued regulations implementing the Dodd-Frank Act's whistleblower provision, which provide that individuals are protected under the Act's anti-retaliation provision even if they do not report to the SEC. 17 C.F.R. Parts 240.21F-1-17 and 249.1800-1801. And in August 2015 (while *Berman* was pending before the Second Circuit), the SEC issued interpretive guidance reiterating its position that individuals who have not reported to the SEC are covered by the Act's anti-retaliation provision. 17 C.F.R. Part 241. Despite Section 78u-6's straightforward text, Respondent contends that under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), this Court should defer to the interpretation set forth in the SEC's rule. This argument fails for multiple reasons.

The SEC's rule is due no deference because "Congress has directly spoken to the precise question at issue," so this Court "must give effect to the unambiguously

expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As explained above, the plain meaning of the Act is that to be a "whistleblower" protected from retaliation for the disclosures listed in paragraph (iii), an individual must report a violation "to the Commission." 15 U.S.C. § 78u-6(a)(6).

Moreover, even if the statute were ambiguous, the Court should not give *Chevron* deference to the interpretation in the SEC's rule. *First*, courts defer to an agency's interpretive discretion only "when an agency recognizes that the Congress's intent is not plain from the statute's face," and therefore purports to exercise interpretative discretion. *See Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *see also Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). But in promulgating the rule here, the SEC never purported to exercise its discretion to resolve a statutory ambiguity. Instead, it justified its action by stating that the Dodd-Frank Act's anti-retaliation provision "expressly protec[ts]" internal whistleblowing. 76 Fed. Reg. 34,300, 34,304 n.38 (June 13, 2011); *see also id.* at 34,304 (referring to "the fact that . . . [paragraph (iii)] includes individuals who report to persons or governmental authorities *other than the Commission*.") (emphasis in the original). The SEC cannot claim deference to interpretative discretion that it never exercised.

Second, an agency interpretation receives *Chevron* deference only when it is "reasonable." *Chevron*, 467 U.S.

at 845. Here, the SEC's rule is unreasonable because the SEC substituted Congress's definition of "whistleblower" with a different definition of its own design. "For purposes of the anti-retaliation protections" of the Dodd-Frank Act, the SEC's rule states, "you are a whistleblower if . . . [y]ou provide . . . information in a manner described" in the anti-retaliation provision itself. 17 C.F.R. Part 240.21F-2(b)(1). Congress has already defined "whistleblower," however, and the SEC had no authority to give that statutory term a different meaning.

II. Broadening Section 78u-6 Beyond Its Statutorily Prescribed Limits Would Undermine The Anti-Retaliation Provisions Of The Sarbanes-Oxley Act

Less than ten years before enacting the Dodd-Frank Act, Congress passed the Sarbanes-Oxley Act, a comprehensive regime to protect internal whistleblowers. In the Sarbanes-Oxley Act, Congress authorized employees to file a complaint with the U.S. Department of Labor ("DOL") if they believe they have suffered retaliation for reporting, internally or externally, mail fraud, wire fraud, bank fraud, securities fraud, a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)-(b). The complaint is investigated by the Occupational Safety and Health Administration ("OSHA"), which renders findings and may order reinstatement of an employee who has been improperly removed from his or her position. 18 U.S.C. §§ 1514A(b)(2)(A), (c)(2)(A); 29 C.F.R. Parts 1980.104-105.

Either party may appeal OSHA's decision to an Administrative Law Judge ("ALJ"), who will permit

discovery, conduct a bench trial, and issue a decision that may be appealed to the Administrative Review Board ("ARB"). 29 C.F.R. Parts 1980.106, 107, 109, 110. An ARB decision may be appealed to a federal court of appeals. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). If a final DOL decision does not issue within 180 days of the employee's initial complaint, the complainant has the option of removing the case to a federal district court, where he may proceed *de novo*. 18 U.S.C. § 1514A(b)(1)(B).

The Sarbanes-Oxley Act's regime imposes important constraints. It provides for initial investigation by the DOL, which can lead to the prompt termination of baseless claims. Resolution within the DOL is the preferred outcome, although complainants may "kick-out" the case to federal court in certain circumstances. 18 U.S.C. § 1514A(b)(1)(B). The limitations period is short—the Sarbanes-Oxley Act prescribed a 90-day limitations period, which the Dodd-Frank Act extended to 180 days. 18 U.S.C. § 1514A(b)(2)(D); *see* Pub. L. No. 111-203, § 922(c)(1)(A)(i), 124 Stat. 1376, 1848 (2010). Monetary relief is limited to compensatory damages, which may include backpay, litigation costs, and reasonable attorneys' fees, § 1514A(c)(2)(B)-(C).

If claimants may proceed under the Dodd-Frank Act's whistleblower provision even when they do not meet its definition of "whistleblower," there will be a proliferation of whistleblower litigation under the Dodd-Frank Act, and the strictly circumscribed scheme of the Sarbanes-Oxley Act will be undermined. As a matter of practical and economic reality, plaintiffs would be far more likely to invoke the Dodd-Frank Act than the Sarbanes-Oxley Act for three reasons.

First, whistleblowers who allegedly experience retaliation in violation of the Dodd-Frank Act may sue as many as 10 years after the retaliatory action (15 U.S.C. § 78u-6(h)(1)(B)(i)), (h)(1)(B)(iii)), whereas the Sarbanes-Oxley Act has a 180-day statute of limitations (18 U.S.C. § 1514A(b)(2)(D)). Second, while the Sarbanes-Oxley Act provides for a single backpay award (*id.* at § 1514A(c)(2)(B)), the Dodd-Frank Act provides for double backpay (15 U.S.C. § 78u-6(h)(1)(C)(ii)). Third, under the Sarbanes-Oxley Act, a complainant must proceed before OSHA, an ALJ, and the ARB before heading to the court of appeals—a more costly and time-consuming endeavor than proceeding under the Dodd-Frank Act.

Although the Sarbanes-Oxley Act provides for emotional distress damages, those awards are usually much lower than backpay awards, and again, Dodd-Frank backpay awards are doubled. As a general matter, an award of $75,000 is at the high-end of emotional distress awards in a Sarbanes-Oxley Act whistleblower retaliation case. *See Maverick Transp., LLC v. Dep't of Labor*, 739 F.3d 1149, 1157-58 (8th Cir. 2014). By contrast, backpay damages in whistleblower retaliation actions are often much higher. *See, e.g.*, Final Verdict Form at 4, *Wadler v. Bio-Rad Labs., Inc.*, No. 15-cv-2356 (N.D. Cal. Feb. 6, 2017), ECF No. 223 (awarding millions in backpay damages but zero dollars in emotional distress damages); *Gunther v. Deltek, Inc.*, ALJ No. 2010-SOX-00049, 2013 DOLSOX LEXIS 35, at *78-81, 95-97 (Dep't of Labor June 5, 2013) (allowing the complainant to recover over $500,000 in backpay, lost bonuses and other lost benefits, but awarding only $10,000 for emotional distress), *aff'd*, ARB Nos. 13-068, 13-069, 2014 WL 7227263 (Dep't of Labor Nov. 26, 2014), *aff'd*, *Deltek, Inc. v. Dep't of Labor*,

649 Fed. App'x. 320 (4th Cir. 2016). As a result, plaintiffs will be far more likely to pursue claims under the Dodd-Frank Act than the Sarbanes-Oxley Act regardless of whether they may obtain emotional distress damages under the latter.

That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims, while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under Section 78u-6. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." (internal citation omitted)).

Moreover, construing the Dodd-Frank Act to provide a cause of action for a violation of the Sarbanes-Oxley Act without an exhaustion of administrative remedies requirement deprives employers of the considerable benefits that the Sarbanes-Oxley Act's administrative scheme provides, as proceeding through the DOL fosters early settlements and dismissals. *See* Occupational Safety and Health Administration, CPL 02-03-007, *Whistleblower Investigations Manual* 6-12 to -13 (2016) ("Voluntary

resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.").

III. Respondent's Assertion That The Chamber Has Taken Inconsistent Positions Is Meritless

Lastly, Respondent argues that the Chamber's position in this case is inconsistent with the position it took in a December 17, 2010 comment letter addressing the SEC's proposed rules for implementing the Dodd-Frank Act's whistleblower provision. (Resp't's Opp'n Cert. at p. 17, n.11). This claim is meritless.

The SEC's proposed rules gave no notice that it intended to expand the meaning of "whistleblower" as used in the anti-retaliation provision, and the Chamber therefore did not have an occasion in its comment letter to address the question presented in this case. Instead, the SEC requested comments on whether it should require whistleblowers to use available internal reporting systems as a condition of award eligibility under the Dodd-Frank Act's bounty program. The Chamber's comments urged the SEC to adopt such a rule. As the Chamber explained, "[c]onditioning an award on appropriate utilization of internal reporting processes would provide a strong incentive for whistleblowers to report internally, which would enable companies to continue to receive essential information about potential misconduct necessary to

maintaining robust corporate compliance programs." *See, e.g.*, Comment Letter from Chamber *et al.* to Secretary Murphy, at 4-5, 15 (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-189.pdf. The Chamber advocated for internal reporting before an individual reports to the SEC, not *instead* of reporting to the SEC.

Moreover, Petitioner's position that Section 78u-6 extends protection from retaliation only to individuals who report to the SEC will not discourage internal reporting. As data from the Ethics Resource Center demonstrates, the vast majority of employees will continue to report internally. *See* Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 2 (2012) (84 percent of whistleblowers who report a complaint outside of the company do so after reporting internally first). The only effect of ruling in favor of Petitioner would be to discourage otherwise meritless retaliation claims.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR ETHICAL SYSTEMS, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's definition of "whistleblower."

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INTEREST OF *AMICUS CURIAE*[1]

Ethical Systems, Inc. is a collaboration of leading social and behavioral scientists who study ethics in organizations. Ethical Systems believes—based on research—that good ethics is good business. Founded in 2014 and housed in NYU Stern's Business and Society Program, Ethical Systems' mission is to improve business ethics and integrity by making academic research about business ethics available and accessible to non-academics, and by developing tools to help companies assess and improve their internal organizational cultures.

Ethical Systems is interested in this case because it involves business ethics and its outcome may have a significant impact on the development of more ethical organizational behavior. A cornerstone for building an ethical organizational system is a culture that encourages employees to speak up against wrongdoing. A decision in this case that would enable companies to retaliate against those who report misconduct internally would crack that cornerstone.

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[1] The parties have consented to the filing of this brief.

No counsel for a party participated in the authoring of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

To combat corporate corruption, we must protect those who report misconduct internally. Empirical evidence shows that the majority of employees who report misconduct do so through internal channels, such as reporting informally to supervisors. For any anti-corruption law to be effective, it must protect this internal reporting. Protecting internal reporting benefits not only the reporting employee, but also the company itself and the public at large, because internal reporting reduces corporate fraud and misconduct and thereby reduces the costs of fraud and misconduct that are incurred by the company and by the public agencies that are tasked with investigation and enforcement. It is therefore in everyone's best interest to protect internal reporting.

ARGUMENT

1. Internal reporting is the most common way that companies learn about corporate misconduct, and there is a public interest in protecting and encouraging internal reporting.

"Tips" are the most common method for detecting corporate fraud and misconduct, and 51.5% of tips come through internal reporting by employees. Association of Certified Fraud Examiners ("ACFE"), Report to the Nations on Occupational Fraud and Abuse (2016) ("ACFE Report"), at 4, 20–26, available at

https://goo.gl/PD62b6. In the United States, 37% of the discovered instances of corporate fraud are discovered through tips; the next closest method of detection is management review, which discovers only 14.3% of the instances of corporate fraud. *Id.* at 23. External audits and law enforcement agencies, combined, detect only 6.5% of the instances of corporate fraud. *Ibid.*

Notably, the losses or costs incurred by a company, due to corporate fraud, go up the longer the fraud goes undetected. *Id.* at 25. Thus, companies have a strong incentive to catch fraud and misconduct in its early stages, to reduce losses and enforcement costs. The median number of months in which fraud is detected through tips (including internal reporting) is 17, whereas the median is 24 months for external audits and 36 months for law enforcement agencies. *Ibid.* Thus, internal reporting is not only the most common method for detecting corporate fraud and misconduct, it is also better than other forms of external detection at catching misconduct in its earlier stages.

The FBI reports that in 2011 (the most recent data that is readily available) it secured over $18 billion in restitution orders and fines for financial crimes, including securities fraud. See Federal Bureau of Investigation, "Financial Crimes Report 2010-2011," available at https://goo.gl/K6v9eM. And the ACFE found that, in 2016, the median monetary loss for companies that detected corporate fraud sooner, through tips that included internal reporting, was one seventh of the median loss for companies that were notified of fraud later, by an external law enforcement agency. See

ACFE Report at 25. Thus, internal reporting is better than other forms of external detection at reducing the costs or losses resulting from corporate misconduct.

Furthermore, empirical evidence strongly suggests that the threat of retaliation for internal reporting may discourage some employees from reporting at all and will encourage some employees to report externally, thereby further increasing the costs incurred by the company. See Marcia Miceli, Janet Near, and Terry Morehead Dworkin, "A Word to the Wise: How managers and policymakers can encourage employees to report wrongdoing," 86 J. of Bus. Ethics 379–396 (2009).

Given the above, companies have a strong financial interest in protecting and encouraging internal reporting as a method for detecting corporate misconduct.[2]

Similarly, it is in the public's best interest for companies to detect and address corporate fraud internally, in its early stages, because this reduces taxpayer costs by lessening the burden on public enforcement agencies (such as the U.S. Securities and Exchange Commission), which are tasked with policing corporate misconduct using taxpayer dollars. And internal reporting also reduces the number of instances of corporate fraud that directly harm the public. Thus,

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[2] Internal reporting can also give companies a more complete picture of the legal and ethical risks they face, and can enable them to address problems and improve decision-making. See Linda Klebe Trevino, Gary R. Weaver, David G. Gibson, and Barbara Ley Toffler, "Managing ethics and legal compliance: What works and what hurts," Cal. Mgmt. Rev. (Winter 1999), at 2, 41.

protecting and encouraging the internal reporting of corporate fraud and misconduct is in everyone's best interest.

2. Employees are less likely to report corporate misconduct internally when they fear retaliation.

Reporting corporate misconduct is a psychologically complex challenge for most employees. They view the decision as a tradeoff between loyalty to the organization and promoting justice or fairness—meaning they view it as a tradeoff between two strongly-held moral values. Adam Waytz, James Dungan, and Liane Young, "The Whistleblower's Dilemma and the Fairness-Loyalty Tradeoff," 49 J. of Experimental Social Psych. 1027–1033 (2013), available at https://goo.gl/79dLUP. Survey research shows that 59% of employees who observe (or are unsure if they have observed) misconduct in the workplace choose not to report it at all. See CEB Global, "Corporate Integrity: How Information About Business Misconduct Travels" ("CEB Survey"), available at https://goo.gl/QFkEb4 (summarizing CEB 2009–2014 RiskClarity Survey results, which are not publicly available). And those who do report corporate misconduct prefer to report it internally —either directly to their supervisors or to executives or other managers. See ACFE Report at 29; see also Janet Near and Marcia Miceli, "After the Wrongdoing: What managers should know about whistleblowing," 59 Bus. Horizon 105–114 (2016) ("In almost all cases, employees first blow the whistle internally, usually to

their direct supervisor or other managers.") (citing Marcia Miceli, Janet Near, and Terry Morehead Dworkin, *Whistleblowing in Organizations*, Psychology Press (2008)).

Indeed, some research shows that over two thirds of those who reported wrongdoing used exclusively internal complaint channels. Jessica R. Mesmer-Magnus and Chockalingam Viswesvaran, "Whistleblowing in organizations: An examination of correlates of whistleblowing intentions, actions and retaliation," 62 J. Bus. Ethics 277–297 (2005). And one study shows that only 7.4% of whistleblowers reported externally to law enforcement or regulatory agencies. ACFE Report at 29. In short, employees overwhelmingly prefer to report internally, and external whistleblowers make up only a small portion of those who choose to report corporate misconduct.

Importantly, it is not the employee's moral compass that determines whether he or she will speak up about observed misconduct; instead, the decision is typically determined by context and circumstances. Mesmer-Magnus and Viswesvaran, *supra*, at 280. Humans are highly susceptible to contextual and social influence. A seminal social-psychology experiment conducted by Stanley Milgram, in 1963, showed just how subservient people can be to authority and to situational influences. In Milgram's experiment, when participants were told by an administrator to continue to administer electric shocks to a student (an actor), 65% of the participants continued to administer the shocks even when they believed they were physically hurting

the student. See generally Stanley Milgram, *Obedience to Authority*, Harper & Row (1974). Social and situational influences on corporate misconduct, and on how to handle it, are similar. Business organizations are complex systems that provide formal and informal cues to employees about ethical behavior. Most employees look to their organization's leaders and to their colleagues for guidance on how to behave. When employees believe unethical behavior is the norm, there will likely be more observations of misconduct and less reporting of that misconduct. See generally Linda Trevino and Katherine Nelson, *Managing Business Ethics: Straight Talk About How To Do It Right*, John Wiley & Sons, Inc. (2011).

To encourage the reporting of misconduct, researchers recommend that organizations attempt to create internal cultures and environments that promote employee voice and dissent. See Near and Micelie, *supra*. This is because evidence shows that employees are most likely to report misconduct when they perceive that their supervisor supports them, and that the organization is likely to be responsive to the complaint. Abhijeet Vadera, Ruth Aguilera, and Brianna Caza, "Making Sense of Whistleblowing's Antecedents," 19 Bus. Ethics Q. 4, 563 (2009); Mesmer-Magnus and Viswesvaran, *supra*, at 280. Without this organizational support, employees are likely to believe that reporting misconduct is not worth the risk of retaliation.

Retaliation is the surest way to show employees that there is no support for reporting misconduct. Retaliation can be interpersonal or organizational, and it can take many forms. See Mesmer-Magnus and Viswesvaran, *supra*, at 281. Often, organizational retaliation is intended only to discourage employees from reporting *externally*, or from publicly disclosing the corporate misconduct. But such retaliatory environments tend to discourage reporting in general, thereby reducing the likelihood of internal reporting. *Ibid.*

In sum, reporting corporate misconduct is a complex and difficult decision for employees to make. Consequently, a lot of misconduct goes unreported. Employees who do decide to report misconduct prefer to report it internally. But they are less likely to do so if they fear retaliation.

3. Anti-retaliation protections are necessary to protect and encourage internal reporting, and to thereby protect the corporation itself and the public at large against corporate corruption.

It is in everyone's best interest to protect and encourage the internal reporting of corporate fraud and misconduct. See Section 1, *supra*. Employees prefer to report misconduct internally, but they are less likely to do so if they are not protected from retaliation. See Section 2, *supra*. Thus, it is in everyone's best interest to protect employees who report misconduct internally from retaliation.

Requiring employees to report corporate misconduct externally, in order to access the anti-retaliation

protections of the Dodd-Frank Act, would produce bad results. It would likely reduce the reporting of corporate misconduct in general, insofar as some employees who might report internally would choose not to report at all. And—to the extent that some employees would turn to reporting externally instead of internally—this increase in external reporting would unnecessarily increase the costs, delays, and burdens borne by (1) the companies that have to face a governmental investigation instead of being able to address their problems internally, and (2) the enforcement agencies that must respond to and investigate these additional external reports. In other words, denying anti-retaliation protections for internal reporting would discourage internal reporting, and thereby increase the costs of corporate misconduct for both companies and regulators, and thus for the investing and taxpaying public at large.[3]

The Dodd-Frank Act is meant to protect employees who report corporate misconduct internally. See Resp. Br. 21–42. Interpreting it otherwise, to require employees to report misconduct externally in order to access protections against retaliation, runs counter not only to the text and legislative intent of the statute (see

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[3] Some may argue that the Sarbanes-Oxley Act provides anti-retaliation protections for internal reporting—but in practice this is questionable. From the Act's effective date until the end of 2011, employees won only 1.8% of all the cases decided by OSHA. Richard Moberly, "Sarbanes-Oxley's Whistleblower Protections Ten Years Later," 64 S.C. L. Rev. 1 (Autumn 2012); see also Megan Mowrey, Stephen Cash, and Thomas Dickens, "Does Sarbanes-Oxley Protect Whistleblowers? The recent experience of companies and whistleblowing workers under SOX," 1 Wm. & Mary Bus. L. Rev. 2 (2010).

id.), but also to the government's and the public's general interest in protecting and encouraging internal reporting (see Section 1, *supra*).

Notably, this interest in protecting and encouraging internal reporting is reflected not only in the text and legislative history of the Dodd-Frank Act, but also in the U.S. Sentencing Commission's guidelines for sentencing organizations found guilty of criminal conduct. See U.S.S.G. § 8B2.1. Under these guidelines, companies may obtain some leniency in sentencing if they "have an effective compliance and ethics program." *Id.* § 8B2.1(a); see also § 8C2.5(f). The guidelines state that a *required* component of "an effective compliance and ethics program" is protection against retaliation for those employees who report misconduct internally. *Id.* § 8B2.1(b)(5)(C) ("The organization shall take reasonable steps to have and publicize a system . . . whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.").

Anti-retaliation protections are necessary to protect and encourage internal reporting. And internal reporting is crucial to protecting companies and the public at large against the costs and harms of corporate fraud and misconduct. Companies that strive to create effective compliance programs and a more ethical culture and environment will adopt anti-retaliation policies and procedures that are consistent with the Sarbanes-Oxley Act, the Dodd-Frank Act, and the sentencing guidelines for organizations. To construe the

Dodd-Frank Act narrowly, so as to strip it of anti-retaliation protections for employees who report internally, would undermine the development of ethical corporate culture and would be counter to the public interest.

CONCLUSION

The Dodd-Frank Act was enacted to protect individuals, corporations, and society at large against corporate corruption. Most of the reporting on corporate corruption occurs internally. Thus, to effectively protect against corporate corruption, the Act must protect those who report internally against retaliation. For the reasons provided, Ethical Systems, Inc. supports the respondent's request that the judgment below be affirmed.

Respectfully submitted,

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v.

PAUL SOMERS,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SENATOR CHARLES GRASSLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[*]

Senator Charles E. Grassley has authored and promoted in Congress numerous pivotal statutes that protect whistleblowers and incentivize them to help identify waste, fraud, and abuse in the American government and economy. Senator Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, and one of the Senate sponsors of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. In addition, Senator Grassley helped author the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, and was an original co-sponsor and key supporter of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465. Most recently, he created the Internal Revenue Service whistleblower program and with Senator Patrick Leahy authored the Federal Bureau of Investigation (FBI) Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516. Along with Senator Ron Wyden, Senator Grassley co-created the Senate Whistleblower Protection Caucus. In more than thirty years legislating for effective whistleblower protection laws and programs, Senator Grassley has cultivated a unique expertise in what makes whistleblowing work and the invaluable role that whistleblowers play in protecting taxpayers and investors alike.

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[*] No counsel for a party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or his counsel made any monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

Senator Grassley also co-authored the whistleblower provisions of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. Although Senator Grassley did not vote in favor of the entire regulatory scheme created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), he supports its protections for whistleblowers—which enhance those set forth in Sarbanes-Oxley—and he consulted with the drafters on whistleblower protection issues. He believes that the anti-retaliation provision of the statute protects those who report internally as well as to the Securities and Exchange Commission (SEC).

SUMMARY OF ARGUMENT

1. The Dodd-Frank Act's anti-retaliation provisions protect those who report internally as well as to the SEC. In Dodd-Frank, Congress sought to enhance the whistleblower protections and reporting provisions of the Sarbanes-Oxley Act, which apply with equal force to internal and external reports. Thus, Dodd-Frank's anti-retaliation provision expressly covers "disclosures that are required or protected" under Sarbanes-Oxley, the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*), and other key federal laws. 15 U.S.C. § 78u-6(h)(1)(A)(iii). Many of these disclosures are internal because Congress understood that robust internal reporting can facilitate a culture of voluntary compliance, deter wrongdoing, and protect investors while conserving scarce government resources.

It would make no sense to read the statute to protect internal disclosures—but only if employees *also* report to the SEC. That is because some protected employees (*e.g.*, auditors and attorneys) are prohibited

from making contemporaneous reports to regulators, and more broadly because many of the salutary benefits of internal reporting would be lost if employees were required to make a simultaneous report to the government: some employees would be deterred from coming forward, while others would feel compelled to over-report in order to ensure access to Dodd-Frank's robust anti-retaliation provisions. Companies would lose valuable opportunities for voluntary compliance, and government resources would be squandered.

Indeed, the obvious effect of petitioner's interpretation will be to discourage internal reporting: If employees can only avail themselves of Dodd-Frank's robust statutory protections by providing information to the SEC, then they will have a greater incentive to bypass internal reporting systems and go straight to the government. That result would undermine many of Sarbanes-Oxley's most important reforms. It would also be ironic because the business community itself has lobbied the hardest to encourage internal reporting in lieu of disclosures to the government. Indeed, both before and after Dodd-Frank was enacted, the business community has repeatedly urged Congress and the SEC to do more to encourage or require whistleblowers to report internally first. Petitioner's position here—designed to stave off liability in this particular lawsuit—is at odds with that entire effort.

2. The broader legislative context also supports respondent's interpretation of the statute. Every modern whistleblower anti-retaliation program protects internal reports. This is true of the False Claims Act, the Whistleblower Protection Act, and the

FBI Whistleblower Protection Enhancement Act, to name a few. In each of these statutes, Congress recognized the value of internal disclosures and the need to protect them. Congress did not always use the same text to achieve this result; instead, the language used has varied depending on the context to suit the particular statutory scheme. But the trend could not be clearer.

Respondent's interpretation is the only one consistent with this prevailing trend. By expressly covering internal reports that are protected or required by Sarbanes-Oxley and other laws, Congress enacted an anti-retaliation provision that is consistent with other modern whistleblower statutes. Petitioner's interpretation, on the other hand, would constitute a substantial step backward for whistleblower protections. Congress did not take that step, and this Court should not either.

ARGUMENT

It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). This Court has been attentive to context in construing anti-retaliation provisions. For example, in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), the Court relied on the statutory context and purpose of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 to hold that the term "employees," which ordinarily "would seem to refer to those having an existing employment relationship" with the employer, also included former employees. The Court acknowledged that the plain meaning of the word

"employee" supported a narrow definition, and that there were "sections of Title VII where, in context, use of the term 'employee' refers unambiguously to a current employee." *Id.* at 343. Nevertheless, the Court was unanimous in holding that in the context of the anti-retaliation provision, a broader understanding was more consistent with Congress's intent. *Id.* at 346.

Here, the legislative context around Dodd-Frank's anti-retaliation provision overwhelmingly supports respondent's interpretation of the statute. Dodd-Frank's anti-retaliation provision seeks to supplement and enhance existing whistleblower protections in the Sarbanes-Oxley Act, but it can only do so if it protects internal reporting as well as disclosures to the SEC. The broader statutory context likewise supports respondent's interpretation because every modern whistleblower anti-retaliation program protects internal reports, and Congress has repeatedly reached consensus that such protections are appropriate in a wide variety of situations. While respondent's position is consistent with this prevailing trend, petitioner's interpretation of the statute would constitute a large step backward that this Court should refuse to take.

I. The Dodd-Frank Act's Anti-Retaliation Provision Reinforces Sarbanes-Oxley By Protecting Internal Whistleblowers.

The Sarbanes-Oxley Act was enacted in the wake of major financial scandals involving companies such as Enron, WorldCom, and Tyco, whose fraudulent financial statements concealed massive malfeasance and cost investors billions of dollars. Congress sought to build a financial accountability regime from the ground up in order to protect taxpayers and investors.

Sarbanes-Oxley thus establishes standards for auditor independence, requires senior executives to take responsibility for the accuracy of their companies' financial statements, compels additional disclosures, and implements other important reforms.

The statute also includes a whistleblower protection provision, codified at 18 U.S.C. § 1514A, which protects employees who come forward with information relating to potential frauds against shareholders from retaliation by their employers. Whistleblowers had been critical to uncovering the Enron scandal, and Congress was acutely aware that complex financial and accounting fraud would be particularly difficult to sniff out without insight from within. Accordingly, Congress adopted anti-retaliation protections, taking the first step in incentivizing private sector whistleblowers. *See* S. Rep. No. 107-146, at 4-5, 18-19 (2002) (describing role of whistleblowers in Enron crisis and explaining the need for more robust and uniform whistleblower protections); *Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enter. of the H. Comm. on Fin. Servs.*, 112th Cong. 10-11 (2011) (*Legislative Proposals*) (statement of Geoffrey Christopher Rapp, Professor of Law, University of Toledo College of Law) ("In recognition of this fact [that whistleblowing is the single most effective method of detecting corporate and financial fraud], the Sarbanes-Oxley Act of 2002 for the first time created a uniform Federal protection for financial fraud whistleblowers.")

Unfortunately, Sarbanes-Oxley did not prevent the financial crisis of 2008. Moreover, it emerged that

the whistleblower provision was underutilized—partially because while the statute protected whistleblowers from retaliation, it did not provide a financial incentive to disclose wrongdoing, and also because the procedural protections for whistleblowers had failed to encourage as many whistleblowers as Congress had hoped. *See Legislative Proposals* at 11; *id.* at 58 (prepared statement of Prof. Rapp) ("Empirical research on whistleblowing since the passage of Sarbanes-Oxley has lent some confirmation to [the] view that the statute was ineffective in motivating whistleblowers to bring fraud to light."). Evidence also emerged that the Department of Labor had been dismissing too many whistleblower complaints based on an erroneous, narrow interpretation of the scope of the statute. *See* News Release, *Leahy, Grassley Press for Update on Labor Department's Handling of Whistleblower Cases* (Oct. 7, 2010), https://www.grassley.senate.gov/news/news-releases/leahy-grassley-press-update-labor-department%E2%80%99s-handling-whistleblower-cases.

In the Dodd-Frank Act, Congress attempted to enact a more robust whistleblower protection provision. *See, e.g.*, *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1023 (N.D. Cal. 2015) ("[T]he legislative history of Dodd-Frank indicat[es] that its purpose was to enact more stringent measures than were contained in Sarbanes-Oxley to protect whistleblowers."); *Legislative Proposals* at 11 (statement of Prof. Rapp) ("Section 922 of the Dodd-Frank Act answered the glaring need for a bounty provision for financial fraud whistleblowers."); Michael E. Clark, *The Dodd-Frank Act's Bounty*

Hunter Provisions, 44 Rev. Sec. & Commodities Reg. 31, 32 (Feb. 9, 2011) ("It is . . . not accidental that Dodd-Frank's bounty provisions in many ways resemble the [False Claims Act]'s highly successful *qui tam* provisions . . . ."). Congress thus included a "bounty" provision similar to the False Claims Act, 15 U.S.C. § 78u-6(b), as well as enhanced protections against retaliation, codified at 15 U.S.C. § 78u-6(h).

Dodd-Frank's anti-retaliation provision expressly protects three kinds of disclosures: (1) "providing information to the [SEC]"; (2) "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information"; and (3) "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002," the Securities Exchange Act of 1934, the federal witness protection statute, and "any other law, rule, or regulation subject to the jurisdiction of the" SEC. 15 U.S.C. § 78u-6(h)(1)(A).

All agree that many disclosures in this third category—especially those that are required or protected under Sarbanes-Oxley—are made internally to facilitate voluntary compliance with the law. For example, auditors must report illegal acts to management and to the board of directors, and may not report outside the company unless and until management and the board refuse to act appropriately. *See* 15 U.S.C. § 78j-1(b). Attorneys have similar internal reporting requirements under Sarbanes-Oxley and the SEC's rules. *See, e.g.*, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015). And of course, every employee's reports to her supervisors about noncompliance are protected under Sarbanes-Oxley's own anti-retaliation provision.

Dodd-Frank clearly seeks to prohibit retaliation against all of these individuals. But if the anti-retaliation provision is read narrowly, as petitioner suggests, to apply only to those whistleblowers to report information to the SEC, then it will not provide any meaningful protection to attorneys, auditors, and others who report internally. That incongruity is nonsensical—and it would also discourage internal reporting, *i.e.*, the very reporting Congress sought to encourage with the third prong of Dodd-Frank's anti-retaliation provision.

Petitioner's interpretation would therefore create unnecessary and improper tension between Dodd-Frank and Sarbanes-Oxley, the statute Dodd-Frank sought to reinforce. Sarbanes-Oxley both required and encouraged the development of internal compliance and reporting systems. Those systems "were built at great cost, reportedly millions of dollars." *Legislative Proposals* at 9 (Statement of Ken Daly, President and CEO, National Association of Corporate Directors). Dodd-Frank seeks to shore those systems up by protecting whistleblowers who make disclosures required by Sarbanes-Oxley. 15 U.S.C. § 78u-6(h)(1)(A)(iii). If the word "whistleblower" is read to exclude participants in internal reporting systems, employees will have a strong incentive to bypass these mechanisms, stymying their development and rendering them ineffective. *See Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) (explaining that requiring employees to report to the SEC in order to obtain protection "would also risk frustrating companies' internal compliance programs, and could deter whistleblowers from participating in internal investigations"); *cf.* Securities Whistleblower

Incentives and Protections, 76 Fed. Reg. 34,300, 34,323 (June 13, 2011) (explaining that one of the Commission's objectives "is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program").

Petitioner's interpretation will also encourage overreporting to the SEC. The Commission's resources are already strained, *see generally Oversight of the U.S. Securities and Exchange Commission: Hearing before the S. Comm. on Banking, Housing & Urban Affairs*, 114th Cong. (2016) (prepared statement of Mary Jo White, Chair, SEC), and additional reports will only exacerbate the problem by requiring the Commission to evaluate, investigate, and then sometimes take enforcement action—when an internal report could have produced a quick course-correction without any expenditure of public resources. *See, e.g.*, *Legislative Proposals* at 67 (written statement of Darla C. Stuckey, Senior Vice President–Policy and Advocacy, Society of Corporate Secretaries and Governance Professionals). This will undermine, rather than enhance, the efficient enforcement of the securities laws.

Respondent's interpretation, embraced by the SEC, would encourage internal reporting and compliance, bolstering the Sarbanes-Oxley reforms. *See Legislative Proposals* at 48 (prepared statement of Robert J. Kueppers, Deputy Chief Executive Officer, Deloitte LLP) (explaining how increased internal reporting "would allow the continuing operation of

effective internal controls, including effective controls that were put in place and strengthened as a result of Sarbanes-Oxley."). "Internal reporting serves a number of important interests—shared by employers and the SEC. It allows companies to remedy improper conduct at an early stage, perhaps before it rises to the level of a violation." *Bussing*, 20 F. Supp. 3d at 733.

For example, timely use of internal procedures gives management an opportunity to correct financial information and can help produce more accurate financial statements to investors. In hearings to consider modifying Dodd-Frank, a witness representing Deloitte LLP argued that Congress should further increase existing incentives to report internally before resorting to the SEC. "Consider a situation where an employee sees a problem late in the fourth quarter of the year but chooses to go around internal channels and report his or her concerns only to the SEC." *Legislative Proposals* at 5 (statement of Kueppers). If company management is not notified of these concerns "before year-end results are announced or before financial statements are released," then "the company may have to restate those errant financials after investors have already relied upon them." *Id.* at 6. Investors would have been in the dark, and the company exposed to liability.

Internal reporting avoids this problem by giving "the company an opportunity to correct problems before they impact the financial statements that are included in reports filed with the Commission or in financial results that are publicly announced before filing." *Legislative Proposals* at 45 (prepared statement of Kueppers). For this reason, pro-business witnesses who testified before Congress stated their

preference for sequential reporting, which would give "management, under the oversight of the audit committee and with appropriate assistance of outside auditors" the time to "move quickly to investigate, prevent a violation from occurring, or mitigate the impact of an error." *Ibid.*

These considerations explain how Dodd-Frank's protections for internal reporting shore up Sarbanes-Oxley. They also illustrate why petitioner's understanding of the relationship between these two statutes is misguided. Petitioner argues that if Dodd-Frank's whistleblower protections apply to internal reports, Sarbanes-Oxley's own whistleblower protections will have little work to do. This ignores the fact that in Dodd-Frank, Congress deliberately created protections that are more robust than Sarbanes-Oxley's—and specifically apply to reports that are required or protected by Sarbanes-Oxley. Congress's intent to expand and enhance whistleblower protection in this area is therefore self-evident. The fact that Congress left Sarbanes-Oxley's more limited whistleblower protections on the books does not suggest that Dodd-Frank's anti-retaliation provision should be read narrowly; it merely reflects Congress's understanding that it needed to add to, not subtract from, the protections available to employees. *Kramer v. Trans-Lux Corp.*, No. 11-cv-1424, 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) ("Yet the Dodd-Frank Act appears to have been intended to expand upon the protections of Sarbanes-Oxley, and thus the claimed problem [that the SEC's interpretation allows potential plaintiffs to pursue claims under Dodd-Frank that they otherwise would have pursued under Sarbanes-Oxley] is no problem at all.") Moreover, the

overlap between the two sets of provisions is not complete: for example, the Sarbanes-Oxley provisions still authorize an administrative remedy that Dodd-Frank's provisions do not—and some employees may prefer to go that route rather than litigate. Still other employees may choose to proceed under both statutes in parallel. *See, e.g.*, *Erhart v. BofI Holding, Inc.*, --- F. Supp. 3d ----, 2017 WL 4005434, at *19 (S.D. Cal. Sept. 11, 2017); *Wussow v. Bruker Corp.*, No. 16-cv-444, 2017 WL 2805016, at *7 (W.D. Wis. June 28, 2017).

Petitioner's position—and that of its *amici*—is also surprising because it was the business community that urged Congress to favor internal reporting in order to prevent overreporting to the SEC. Indeed, the business community felt so strongly about the importance of internal reporting and maintaining use of their Sarbanes-Oxley compliance measures that it asked the SEC and Congress to include a requirement for all employees to report to immediate supervisors prior to submitting complaints to the SEC. *See, e.g.*, Letter from Paul Schett Stevens, President & CEO, Inv. Co. Inst., to Chairman Hon. Scott Garrett and Ranking Member Hon. Maxine Waters (Dec. 13, 2011), https://www.ici.org/pdf/12_hr2483_pss_ltr.pdf (expressing support for proposed legislation that would require whistleblowers to report through internal channels before reporting to the SEC); Apache Corp. et al. Comment Letter on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (File No. S7-33-10) at 2-4 (Feb. 18, 2011), https://www.sec.gov/comments/s7-33-10/s73310-283.pdf (urging the SEC to use the "extraordinarily

broad rulemaking authority" that "Congress has conferred" to "make utilization of effective internal reporting procedures a precondition for receiving an award.")

In fact, the testimony to Congress suggests that members of the business community, while advocating for internal reporting requirements, assumed or took for granted that Dodd-Frank's anti-retaliation provisions apply to internal whistleblowers. *See Legislative Proposals* at 46 (prepared statement of Kueppers) (arguing that whistleblowers should first report internally and noting that "[w]hile we recognize that there could be circumstances where a potential whistleblower believes that the company's internal program is ineffective or fears retaliation, *the Dodd-Frank Act already has taken that into consideration by including anti-retaliation provisions*") (emphasis added). Similarly, it was the business community that successfully lobbied the SEC to adopt rules favoring internal reporting. *See* 76 Fed. Reg. at 34,300, 34,323.

Now, however, it appears that while businesses are happy to require their employees to report internally, they are unwilling to endorse protection for employees who would make those very reports. That is hypocrisy, pure and simple, and Congress did not endorse it. This Court should read the statute to protect internal reporters, consistent with Congress's desire to shore up Sarbanes-Oxley and enhance whistleblower protections in the wake of the 2008 financial crisis.

II. Protection For Internal Whistleblowers Is Consistent With Every Other Major Whistleblower Anti-Retaliation Program.

Another strong fact supporting respondent's interpretation of the statute is that every major modern whistleblower anti-retaliation program protects internal reporting. The Court "assume[s] that Congress is aware of existing law when it passes legislation." *Hall v. United States*, 566 U.S. 506, 516 (2012) (quotation marks omitted). Here, Congress was well aware that effective whistleblower programs require robust anti-retaliation protections when it enacted Dodd-Frank—and it was equally mindful of the strong trend toward expanding those anti-retaliation protections to internal reporting. Consequently, it would not be "logical to conclude that Congress intended to encourage an across-the-board departure from the general practice of first making an internal report." *Bussing*, 20 F. Supp. 3d at 733. At the absolute minimum, one would expect there to be some evidence in the legislative history to support the proposition that Congress intended to enact a uniquely narrow anti-retaliation provision, if indeed that had been the case. *See* 76 Fed. Reg. at 34,326 (rejecting a proposed comment that would cause Dodd-Frank's anti-retaliation provisions to "deviate from the operation of other established Federal whistleblower award programs" when there was "no indication in the text or legislative history of Section 21F that Congress intended that result"). No such evidence exists.

Indeed, time and again, members of Congress from both parties have reached consensus over the proposition that whistleblowers—including those who

report internally—ought to receive the strongest anti-retaliation protections available. It is fair to say that nobody who takes whistleblower protection seriously would urge a contrary result. Petitioner's reading of the statute would buck that consensus, forcing a rollback that no program in recent years has undertaken and that is plainly at odds with the purpose of whistleblower programs—to uncover and combat waste, fraud, and abuse.

A. Major Whistleblower Programs Extend Protection For Internal Whistleblowers In Order To Effectively Protect The Public Against Fraud.

Congress understands that anti-retaliation protections for internal whistleblowers are necessary. This belief has driven numerous recent updates to federal whistleblower programs that consistently strengthen protections for internal whistleblowers. Such developments have occurred across the board—for uncovering wrongdoing against the government, within the government, and in the private sector.

1. False Claims Act

As the "most successful anti-fraud act in the United States," the False Claims Act (FCA), provides a natural starting point for examining trends in federal whistleblower programs. *See The False Claims Act Is America's Most Important Whistleblower Law*, National Whistleblower Center, http://www.whistleblowers.org/resources/false-claims-act (last visited Oct. 17, 2017). Indeed, its highly successful *qui tam* provisions enabled the Department of Justice (DOJ) to recover over $37 billion since Senator Grassley's 1986 amendments. *See* Civil

Division, DOJ, Fraud Statistics – Overview, October 1, 1987 – September 30, 2016, https://www.justice.gov/opa/press-release/file/918361/download (Dec. 13, 2016). It is no surprise, then, that the FCA provided a model for Dodd-Frank's bounty program.

More recent changes to the FCA follow the trend of expanding whistleblower protections. The Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617—also a reaction to the 2008 financial crisis—preceded Dodd-Frank by a year. *See Prepared Statement of Senator Chuck Grassley of Iowa, The Need for Increased Fraud Enforcement in the Wake of Economic Downturn: S. Comm. on the Judiciary* (Feb. 11, 2009), https://www.grassley.senate.gov/news/news-releases/need-increased-fraud-enforcement. Broadly, FERA sought to "increase accountability for the corporate and mortgage frauds" that contributed to the crisis. S. Rep. No. 111-10, at 1 (2009). Moreover, Congress knew that recovery from the crisis would require a massive public expenditure—and it was critical to protect scarce taxpayer dollars from fraud and to ensure their proper use.

Specifically as to whistleblowers, Congress amended the FCA to overrule judicial precedent that had interpreted the anti-retaliation provisions too narrowly. The legislation "ensure[d] that the law adheres [to the] original intent of the FCA." *See Prepared Statement of Senator Chuck Grassley of Iowa, Senate Floor Debate on Fraud Enforcement and Recovery Act* (Apr. 20, 2009), https://www.grassley.senate.gov/news/news-releases/false-claims-act-and-fraud-enforcement. Among other changes, FERA broadened the definition of protected

activity to include "efforts to stop 1 or more violations" of the FCA. 31 U.S.C. § 3730(h)(1). This broad language "is intended to make clear that this subsection protects not only steps taken in furtherance of a potential or actual qui tam action, but also steps taken to remedy the misconduct through methods such as internal reporting to a supervisor or company compliance department." 155 Cong. Rec. E1295-03, E1300 (May 18, 2009). Courts have rightfully interpreted this change as covering internal efforts to stop violations. *See, e.g.*, *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 97 (2d Cir. 2017); *Jones-McNamara v. Holzer Health Sys.*, 630 Fed. Appx. 394, 399 (6th Cir. 2015); *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1108-09 (7th Cir. 2014).

The FERA amendments to the FCA thus sought to protect whistleblowers apart from whether they resort to the FCA's *qui tam* bounty provisions. The statute illustrates Congress's general understanding that anti-retaliation protections should be broader than bounty provisions because it does not make sense to encourage an official report or a lawsuit every time an employee investigates a potential compliance issue—and it therefore does not make sense to require employees to commence official proceedings simply to obtain basic protection for their livelihoods. Dodd-Frank was enacted against the same backdrop, with the same understanding.

2. *Whistleblower Protection Act and Whistleblower Protection Enhancement Act*

The steady march toward increasing protections to internal whistleblowers is also reflected in statutes addressing wrongdoing within the government. Congress passed the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, to bolster the largely unsuccessful attempts of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, to encourage and protect whistleblowing activity among federal government employees. 135 Cong. Rec. S2779-01, S2787 (Mar. 16, 1989) (noting that the CSRA had done "little to encourage Federal employees' confidence in their ability to reveal problems in their agencies"); *see also id.* at S2782 (noting that "a string of restrictive Merit Systems Protection Board and federal court decisions" had made it "unduly difficult for whistleblowers" to prevail).

As had happened with the FCA, courts over time improperly narrowed the WPA contrary to Congress's intent, and Congress subsequently sought to clarify its preference for broader whistleblower protections. *See* S. Rep. No. 112-155, at 4-5 (2012) (expressing concern that "the Federal Circuit and the [Board] have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected."). In response, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465. As with the FERA amendments, the WPEA responded directly to the judiciary's narrowing of protections specifically with respect to

internal whistleblowers. S. Rep. No. 112-155 at 5; *see also Congress Strengthens Whistleblower Protections for Federal Employees*, ABA Section of Labor and Employment Law Flash (Nov.-Dec. 2012), https://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

Consistent with the recent expansion of protections to whistleblowers, the WPEA clarified that the WPA's anti-retaliation provisions cover whistleblowers that report internally, including to persons or supervisors that participated in the wrongdoing. The WPEA also clarifies that employees are not excluded from protection for making disclosures during the course of their normal duties. *See* § 101(f), 126 Stat. at 1466 (codified at 5 U.S.C. § 2302(f)). The statute also enhanced judicial remedies for these internal reporters. *See* § 107(b), 126 Stat. at 1469.

3. FBI Whistleblower Protection Enhancement Act

In December 2016, Congress made its latest mark in the now-familiar pattern of updating and expanding whistleblower laws to respond to practical realities. This time, it unanimously extended anti-retaliation protections specifically to internal whistleblowers in the FBI. The FBI Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, 130 Stat. 1516, was enacted to close a loophole in federal employee protections created in DOJ regulations. The DOJ's rules "only protect[ed] FBI employees who experience reprisal after they report wrongdoing to a handful of offices or individuals," even though FBI

policy "encourages employees to report through their chain of command." 162 Cong. Rec. S7128-05, S7129 (Dec. 9, 2016) (statement of Sen. Grassley). This was unacceptable to a unanimous Congress, which rejected the proposal to condition protection for whistleblowers on their participation in a convoluted internal reporting scheme.

The reasoning behind that decision is instructive. DOJ's rules for FBI employees failed to protect whistleblowers that first reported wrongdoing to their immediate supervisor. This went against both common sense and common practice, *i.e.*, that an employee's first instinct and action is often to report to his or her boss. *Cf. Legislative Proposals* 11 (statement of Prof. Rapp) ("Most whistleblowers see themselves as loyal employees and they often blow the whistle out of a desire to help their firms."). It was illogical for the law to attempt to broadly encourage fraud disclosure yet deny protection for the most obvious report.

B. Only Respondent's Interpretation Is Consistent With The Prevailing Trend Of Major Whistleblower Programs.

Only respondent's interpretation of Dodd-Frank is consistent with the overwhelming legislative trend toward comprehensive protection for whistleblowers—including for internal reporting. It would have been extremely strange for Congress to have explicitly protected all "disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act, and every other law enforced by the SEC—including myriad required and recommended internal reports—while denying protection to the employees who make those very reports. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

Respondent's reading, by contrast, is the most consistent not only with the clear import of the statutory text, but also with the functioning of every other modern whistleblower anti-retaliation program.

Congress has repeatedly demonstrated through its updates to major whistleblower programs a sophisticated understanding of what makes such laws effective. That understanding unmistakably includes protecting internal disclosures. Yet petitioner's interpretation would reintroduce to Dodd-Frank exactly the same problems that Congress has eliminated in other laws. For instance, a major reason that Congress passed the FBI WPEA is because it realized that requiring vague and confusing statutory procedures was impeding whistleblowers. As many have noted, those same administrated complications posed similar roadblocks to Sarbanes-Oxley's success in the years following its passage, rendering it less effective than originally hoped. That would be a substantial step backwards that Congress has consistently refused to take; this Court should refuse as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* LIME ENERGY SERVICES COMPANY AND PRESTIGE CRUISES INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Lime Energy Services Company ("Lime Energy") and Prestige Cruises International ("Prestige Cruises") respectfully submit this brief as *amici curiae* in support of Petitioner Digital Realty Trust, Inc. ("Digital").

Lime Energy is a national provider of energy savings to utility clients under Small Business Direct Install (SBDI) programs. It has a 25-year track record in providing energy efficiency projects to thousands of small business customers annually, completing over 100,000 of such projects for small and mid-sized businesses across the nation since 2009, and helping small and mid-sized businesses gain access to over $272 million in utility incentives.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, their counsel, *amicus* Lime Energy's insurance carrier, Chubb (providing defense costs to Lime Energy through a policy of insurance), and *amicus* Prestige Cruises' insurance carrier, AIG (providing defense costs to Prestige Cruises through a policy of insurance), made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief. Both Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

Lime Energy is also an employer and the defendant in a case before the United States District Court for the District of New Jersey which considered the very issue before the Court in this case. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *13-14 (D.N.J. Aug. 13, 2015). In *Dressler*, plaintiff Wendy Dressler was a former employee of Lime Energy who alleges she voiced concerns internally about discrepancies in accounts receivable but who did not go to the SEC. After she was terminated, Dressler filed a complaint, alleging retaliatory termination in violation of the whistleblower-protection provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 15 U.S.C. § 78u-6, *et seq.*[2]

Lime Energy moved to dismiss, arguing Dressler did not qualify as a "whistleblower" under the Dodd-Frank Act's anti-retaliation provision because she did not make required protected disclosures to the SEC. The district court denied the motion to dismiss, holding that the whistleblower protections of the Dodd-Frank

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[2] The whistleblower-protection provisions of the Dodd-Frank Act, Pub. L. No. 111-203, Title IX, § 922(a), 124 Stat. 1376, 1841 (2010), added section 21F to the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78u-6.

Act are ambiguous under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and deferred to the rule promulgated by the SEC (Rule 21F-2(b)(1)) as a reasonable and permissible construction of the Dodd-Frank Act. *See* 2015 U.S. Dist. LEXIS 106532, at *37-43. The parties were in the midst of extensive discovery, but the district court has stayed proceedings pending this Court's decision in this case. Accordingly, resolution of the question presented in this case will have a direct impact on the outcome of *Dressler v. Lime Energy*.

Prestige Cruises, together with its subsidiaries, operates cruise ships under the Oceania Cruises and Regent Seven Seas Cruises brands in the upper premium and luxury segments. It operates cruise ships with destinations to Scandinavia, Russia, Alaska, the Caribbean, Panama Canal, South America, Europe, the Mediterranean, the Greek Isles, Africa, India, Asia, Canada and New England, Tahiti and the South Pacific, Australia, and New Zealand. The company was founded in 2007 and is headquartered in Miami, Florida. Prestige Cruises International, Inc. operates as a subsidiary of Norwegian Cruise Line Holdings Ltd.

Prestige Cruises is also an employer and was the defendant in a case before the United

States District Court for the Southern District of Florida which ruled in favor of Prestige Cruises and other related defendants on the same issue before the Court in this case. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-CIV-KING, 2015 U.S. Dist. LEXIS 107181, at *9-11 (S.D. Fla. Aug. 14, 2015). In *Duke*, plaintiff ("Duke") was a former employee of Prestige Cruise Holdings, Inc. ("Prestige Holdings"), a wholly-owned subsidiary of Prestige Cruises, who alleged he internally reported a fraud allegedly perpetrated by Prestige Holdings, but did not report the alleged fraud to the SEC. Duke was later terminated and claimed it was the result of his alleged report and investigation into the alleged fraud. He filed a complaint claiming retaliatory termination in violation of the Dodd-Frank Act, the Florida Private Sector Whistleblower Act, FLA. STAT. § 448.102(3) (2013) (the "FWA"), and section 806 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

Prestige Cruises, Prestige Holdings, and other defendants moved to dismiss the complaint in part. They argued that Duke's Dodd-Frank Act claim failed because he was not a "whistleblower" within the meaning of the statute inasmuch as he made no reports to the SEC concerning alleged illegal activity. The district court ultimately dismissed the entire complaint

with prejudice. As to the claim under the Dodd-Frank Act, the district court noted Duke did not allege that he provided any information to the SEC during the investigation and dismissed the claim with prejudice to the extent it relied solely upon his involvement with an internal investigation.

Duke appealed the dismissal to the Eleventh Circuit, arguing that his internal reports were sufficient to invoke whistleblower protection under the Dodd-Frank Act. *See Duke v. Prestige Cruises Int'l*, No. 16-15426-G, Appellant's Br. 18-21 (11th Cir. Nov. 17, 2016). Briefing is not complete in the appeal, and while oral argument had been scheduled for September 20, 2017, the Eleventh Circuit has now stayed the proceedings pending this Court's decision in this case. *Id.*, Order (11th Cir. Aug. 23, 2017).

The question presented is an issue of vital concern to the country's business community. The Dodd-Frank Act's anti-retaliation provision has a statute of limitations of 6-10 years. Unless this Court reverses the decision below, many entities will remain vulnerable to Dodd-Frank whistleblower claims brought by a former employee long separated from the company—like the one Lime Energy currently faces and the one Prestige Cruises will face if the Eleventh Circuit

reverses the district court's Dodd-Frank holding on appeal.

SUMMARY OF ARGUMENT

Lime Energy and Prestige Cruises, as the undersigned *amici*, urge this Court to reverse the decision below. First, the purpose of this brief is to stress that if any employee is not considered a "whistleblower" under the Dodd-Frank Act because the employee allegedly complained internally, but not to the SEC, the employee would not be left without a remedy. In addition to the Sarbanes-Oxley Act, there are multiple alternative remedies available to such an employee, including state statutes and common-law wrongful discharge actions based on violation of public policy. That this is so is exemplified by the *Duke* case: Duke asserted Sarbanes-Oxley and state law claims in addition to his Dodd-Frank claim. The availability of these alternate remedies undercuts any need to expand the Dodd-Frank definition of "whistleblower" beyond the clear statutory language.

Second, the predicament faced by Lime Energy and Prestige Cruises (if the Eleventh Circuit reverses the district court's Dodd-Frank holding on appeal) serves as a concrete example of the problems created by the decision below. In *Dressler*, as in this case, the plaintiff alleged-

ly raised concerns internally about alleged misconduct but admittedly never reported those concerns to the SEC. Nevertheless, after Dressler was terminated, she sued two years later in federal court under the Dodd-Frank Act. Like Respondent in this case, the basis of Dressler's Dodd-Frank Act claim was that she engaged in protected activity under Sarbanes-Oxley and is therefore covered under section 78u-6(h)(1)(A)(iii) of the Dodd-Frank Act. *See Dressler v. Lime Energy*, No. 3:14-cv-07060, Docket Entry ("DE") 1, Compl. ¶¶ 51-56 (D.N.J. Nov. 10, 2014). The district court denied Lime Energy's motion to dismiss and held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, that the retaliation provision of the Dodd-Frank Act is ambiguous, and accorded *Chevron* deference to the SEC's regulation, which took the position that internal complaints are sufficient to qualify a plaintiff as a Dodd-Frank "whistleblower." As noted, the parties were in the midst of extensive discovery, but the district court stayed proceedings pending this Court's decision in this case.

Absent the district court's denial of Lime Energy's motion to dismiss holding that Dressler qualified as a Dodd-Frank whistleblower, Dressler's lawsuit would have been time-barred due to the differences between the statute of

limitations contained in the Dodd-Frank Act under which she sued (between six and ten years) and the Sarbanes-Oxley Act under which she claims she engaged in whistle-blowing activity (six months). The *Dressler* case thus serves as an object lesson in how dilatory, opportunistic plaintiffs are incentivized by the decision below and decisions like it.

Likewise, if the Eleventh Circuit reverses the dismissal of Duke's Dodd-Frank claim in *Duke v. Prestige Cruises International*, Prestige Cruises will face the same predicament currently faced by Lime Energy in *Dressler*. Like Respondent in this case, the basis of Duke's Dodd-Frank claim was that he is entitled to protection as a whistleblower because he engaged in protected activity under Sarbanes-Oxley, notwithstanding his failure to report the allegations of wrongdoing to the SEC. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-CIV-KING, DE7, Am. Compl. 21 (S.D. Fla. Nov. 24, 2014). Even though the district court dismissed Duke's Dodd-Frank claim, Duke also was able to raise claims under Sarbanes-Oxley and the FWA. *See id.* at 18-21, 22. The FWA claims currently remain pending in Florida state court, where they are being actively litigated. *See Duke v. Prestige Cruise Servs., LLC*, No. 16-020729-CA-01 (Fla. 11th Cir. Ct.).

For these reasons, as well as the reasons discussed by Petitioner and fellow *amici*, the Court should reverse the decision of the court below.

ARGUMENT

I. The Court Should Reject Respondent's Attempt To Expand the Dodd-Frank Definition of "Whistleblower" in Light of the Other Protections Available to Employees Who Complain Internally.

If the Court were to agree with Petitioner and adhere to the plain language of the Dodd-Frank Act's definition of "whistleblower," which requires an external complaint to the SEC, those employees who complained only internally still have a remedy under both the Sarbanes-Oxley Act and an assortment of state statutes and common-law remedies, as the *Duke* case makes clear.

The Sarbanes-Oxley Act reflects a conscious choice by Congress to permit additional protections to whistleblowers who bring to light fraud perpetrated by publicly traded companies, including those whistleblowers who only report internally. Sarbanes-Oxley provides a remedy for an employee or even an independent contractor of a covered issuer of securities to seek relief

for purported retaliation. *See* Br. of *Amicus Curiae* Ctr. for Workplace Compliance 27-28. Indeed, in *Duke v. Prestige Cruises Int'l*, Duke alleged that the Sarbanes-Oxley Act was an alternative basis for imposing liability upon Prestige. Dodd-Frank never was intended to be the only available remedy for internal-only whistleblowers (or even a remedy at all), and the plain language of Dodd-Frank—a reflection of a conscious choice by Congress—makes that intent clear. *See* Pet. Br. 16-18. Respondent likewise ignores the potent protections available under state law whistleblower statutes, such as the state law claim raised in *Duke*.

The very existence of Duke's other federal and state law claims illustrates that terminated employees who complain internally have remedies that do not require interpreting the whistleblower protections of Dodd-Frank in a way that is contrary to the statute's plain, unambiguous language. In the federal action, Duke asserted Sarbanes-Oxley and FWA claims against Prestige Holdings and other defendants based on the same allegations of his termination for internally bringing an alleged fraud to light. *See Duke v. Prestige Cruises Int'l*, No. 14-23017-civ-KING, DE7, Am. Compl. 18-21, 22 (S.D. Fla. Nov. 24, 2014). The district court ultimately dismissed the Sarbanes-Oxley claims

with prejudice because the defendants in question were not entities covered under the statute. *Duke*, 2015 U.S. Dist. LEXIS 107181, at *10-11. However, the court declined to exercise jurisdiction over the remaining state law FWA claim. *Duke*, No. 14-23017-civ-KING, DE63, Final Ord. of Dismissal 6 (July 13, 2016).

Duke's FWA claim is currently proceeding in Florida state court. *See Duke v. Prestige Cruise Servs., LLC*, No. 16-020729-CA-01 (Fla. 11th Cir. Ct.). There, Duke contends, in the same manner as in the federal court action, that he was retaliated against following an internal report and his participation in an internal investigation related to alleged fraud. *See id.*, Am. Compl. ¶¶ 13-18 (Nov. 23, 2016). The dismissal of his Dodd-Frank claim has had no impact on his ability to seek relief under the FWA. In fact, while the state court originally stayed that action pending the resolution of the federal appeal, *see id.*, Ord. Granting Defs.' Mot. to Stay (Dec. 7, 2016), it recently lifted the stay, and the case is proceeding notwithstanding the appeal. *See id.*, Ord. on Defs.' Mot. to Stay (June 9, 2017). Notwithstanding any failure to properly plead his allegations, and even though the federal district court determined Duke does not have the right to seek a remedy under Dodd-Frank, he can and is seeking relief under the

FWA, assuming he meets the independent requirements of that statute.

One of the virtues of state statutory remedies is their intrinsic flexibility: they reflect the public's changing interests as advanced through their elected representatives. For example, New Jersey, the state in which Wendy Dressler worked and sued Lime Energy, has a state whistleblower statute which readily covers the alleged conduct at issue in this case and the *Dressler* case. New Jersey's Conscientious Employee Protection Act ("CEPA") provides:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following: [a] Discloses or threatens to disclose *to a supervisor* or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee . . . . or any governmental entity . . . ; or (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any

> shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental agency; . . .or [c] Objects to, or refuses to participate in any activity, policy, or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee . . . . or (2) is fraudulent or criminal, including any activity, policy, or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee . . .; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J. REV. STAT. § 34:19-3 (emphasis added).

As a remedial statute, New Jersey courts construe CEPA "liberally to effectuate its important social goal . . . to 'protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'" *Hitesman v. Bridgeway, Inc.*, 93 A.3d

306, 316 (N.J. 2012) (citations omitted). A plaintiff bringing a CEPA claim must demonstrate that "(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a 'whistleblowing' activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action." *Battaglia v. United Parcel Serv., Inc.*, 70 A.3d 602, 625 (N.J. 2013) (citation omitted); *see also Hitesman*, 93 A.3d at 316 ("The statute thus shields an employee who objects to, or reports, employer conduct that the employee reasonably believes to contravene the legal and ethical standards that govern the employer's activities.").

Florida's whistleblower statute, the FWA, provides that "[a]n employer may not take any retaliatory personnel action against an employee because the employee has . . . [o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." FLA. STAT. § 448.102(3) (2013). As such, the FWA provides a cause of action to employees who are allegedly

wrongfully discharged based upon an employer's alleged retaliatory motive.

To establish a prima facie case of retaliation in violation of the FWA, a party must plead and prove that: (i) he or she engaged in statutorily protected expression; (ii) he or she suffered an adverse employment action; and (iii) the adverse employment action was causally linked to the statutorily protected expression. *See Sierminiski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000) (applying Title VII retaliation analysis to FWA claim); *see also Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003). To establish that he or she engaged in statutorily protected expression sufficient to prove a prima facie case of retaliatory discharge under the FWA, the party must plead and prove that he or she objected to or refused to participate in: "(i) an illegal activity, policy or practice of an employer, (ii) illegal activity of anyone acting within the legitimate scope of their employment, or (iii) illegal activity of an employee that has been ratified by the employer." *Pinder v. Bahamasair Holdings Ltd., Inc.*, 661 F. Supp. 2d 1348, 1351 (S.D. Fla. 2009) (citing *Sussan v. Nova Se. Univ.*, 723 So. 2d 933, 934 (Fla. 4th DCA 1999)).

The FWA has no administrative prerequisites to bringing a claim. As long as an employ-

ee has engaged in the protected activity enumerated in the statute, the employee is free to go straight into court. Remedies abound for those who allegedly "blow the whistle" on their employers.

Hawaii enacted similar coverage, also targeting the kind of conduct alleged in this case and in *Dressler* and *Duke*. The Hawaiian legislature passed the Whistleblower Protection Act, which provides that "[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because (1) the employee . . . reports or is about to report *to the employer*, or reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of (A) [a] law, rule, ordinance, or regulation . . . ." HAW. REV. STAT. § 378-62(1)(A) (emphasis added).

Minnesota's state whistleblower statute is one of the broadest, providing that "[a]n employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee . . . because (1) the employee . . . in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule pursuant to law *to an employer* or to any governmental body or law enforcement official . . . ." MINN. STAT. § 181.932(1) (emphasis added). Also, the employ-

ee is protected if "the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason." *Id.* § 181.932(4); *see also Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 274 (Minn. 2002) (concluding that the statute "clearly and unambiguously protects reports made of a violation of any federal or state law or rule adopted pursuant to law. It does not contain an explicit public policy requirement.") (citation omitted).

New Hampshire's statute also protects employees who, *inter alia*, "in good faith, report[] . . ., verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States"; or who "objects to or refuses to participate in any activity that the employee, in good faith, believes is a violation of the law." N.H. REV. STAT. ANN. § 275-E:2. In *Appeal of Bio Energy Corp.*, the New Hampshire Supreme Court made clear that the statute covered whistleblowers who only complained internally. 607 A.2d 606, 608 (N.H. 1992) ("Paragraph I of RSA

275-E:2 does not require that an employee report a potential violation of law to a third party. By its very terms, it covers reports *made either to employers* or to third parties.") (emphasis added).

Almost identical is language in Maine's Whistleblowers' Protection Act, which provides that "[n]o employer may discharge, threaten or otherwise discriminate against an employee . . . because: (A) The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing *to the employer* or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State, or the United States." ME. REV. STAT. ANN. tit. 26, § 833(1)(A) (emphasis added).

And the language of Oregon's statute amounts to the same thing: "It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee . . . for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." OR. REV. STAT. § 659A.199(1); *see also Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 1000 (Or. 2017)

(holding that "the Oregon legislature intended the term 'reported' . . . to mean a report of information to *either an external or internal* authority.") (emphasis added). All of these statutes would cover the kind of conduct alleged by Respondent and by Dressler and Duke.

Legislators in Rhode Island tweaked the same language slightly in the Whistleblowers' Protection Act. The statute covers whistleblowers who complained internally, but adds the provisos: "unless the employee knows or has reason to know that the report is false. Provided, that if the report is verbally made, the employee must establish by clear and convincing evidence that the report was made." 28 R.I. GEN. LAWS § 28-50-3(4).

California legislators expanded their whistleblower statute, California Labor Code § 1102.5, so that after January 1, 2014, it no longer protected only those employees who complained to the government but also employees who complained internally. CAL. LAB. CODE § 1102.5(a), (b) (protecting those who "disclose[d] information to . . . *a person with authority over the employee*") (emphasis added).

Missouri recently passed and signed Senate Bill No. 43, the "Whistleblower's Protection Act," which took effect on August 28, 2017.

Those protected include employees who "report[] to his or her *employer* serious misconduct of the employer that violates a clear mandate of public policy as articulated in a constitutional provision, statute, or regulation promulgated under statute; or an employee of an employer who has refused to carry out a directive issued by his or her employer that if completed would be a violation of the law." Mo. SB 43 § 285.575 ¶ 2(4) (emphasis added).[3]

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[3] Most of these state statutes include a statute of limitations requiring actions to be brought within 1 to 3 years. *See, e.g.*, N. H. REV. STAT. ANN. 275-E:2(II) (3 years); *Ayala v. Frito Lay, Inc.*, No. 1:16-cv-01705, 2017 U.S. Dist. LEXIS 102350, at *44, 47 (E.D. Cal. June 30, 2017) (noting law is unclear as to whether 1-year or 3-year statute of limitations applies to actions brought under CAL. LAB. CODE § 1102.5, but applying 3-year statute of limitations); *Bicker v. City of Portland*, No. 3:16-cv-00215, 2016 U.S. Dist. LEXIS 91480, at *15 (D. Or. July 14, 2016) (applying 1-year statute of limitations to claims brought under Oregon whistleblower statutes); *Goddard v. APG Security-RI, LLC*, 134 A.3d 173, 178 (R.I. 2016) (3 years); *Frost v. Walmart DC*, No. 2:14-cv-84, 2015 U.S. Dist. LEXIS 24472, at *10 (D. Me. Feb. 28, 2015) (2 years). *But see Ford v. Minneapolis Pub. Sch.*, 874 N.W.2d 231, 232 (Minn. 2016) (6 years). The Dodd-Frank Act's lengthy six to ten-year statute of limitations stands out in bold relief against the state statutes' shorter filing deadlines (as well as those imposed by Sarbanes-

This list is illustrative rather than exhaustive. And all this is not to say that this approach is uniform. Still, even in those states that do not yet protect whistleblowers who complain internally, legislators are free to enact similar legislation if the public that voted them into office so desires.

Moreover, "the majority of states [have] carv[ed] out a public-policy exception to the general rule of at-will employment for wrongful-discharge claims." *Dorshkind v. Oak Park Place of Dubuque, II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013); *see also, e.g., Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980) (recognizing that an employer may terminate an at-will employee for any reason, or for no reason at all, so long as the employer's decision does not violate public policy). In some states, these common-law doctrines protect certain kinds of whistle-blowing employees. For example, in Texas, the Texas Supreme Court created a narrow public policy exception to the employment-at-will doctrine. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding an employee may sue for wrongful termination if he is fired for the sole reason that he re-

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Oxley), once again illustrating the legislative effort to motivate complainants to report directly to the SEC.

fused to perform an illegal act); *see also Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 749 (Wash. 2015) (internal reporting case) (holding that to state a wrongful discharge claim, a plaintiff "must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy . . . [that] is clearly legislatively or judicially recognized . . . [including] where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.") (citations omitted). And in *Dorshkind*, the Iowa Supreme Court held that internal whistleblowing is a protected activity for purposes of establishing a wrongful-discharge claim. 835 N.W.2d at 306.

Dorshkind also noted "[o]ther jurisdictions have similarly identified internal whistleblowing as a protected activity for purposes of establishing wrongful-discharge claims." *Id.* at 306 n.4 (citing *Kearl v. Portgage Envtl., Inc.*, 205 P.3d 496, 500 (Colo. App. 2008); *Lanning v. Morris Mobile Meals, Inc.*, 720 N.E.2d 1128, 1130-31 (Ill. App. Ct. 1999); *Moyer v. Allen Freight Lines*, 885 P.2d 391, 395 (Kan. Ct. App. 1994); *Barker v. State Ins. Fund*, 40 P.3d 463, 468 (Okla. 2001)). The *Dorshkind* court also noted that "[o]nly the minority of courts refuse to protect an employee who makes an internal report." 835 N.W.2d at 306 n.4 (citing *Wholey v.*

Sears, Roebuck & Co., 803 A.2d 482, 496 (Md. 2002)). Other aspects highlighted by *Dorshkind* were the cases that "g[a]ve less credence to the difference between internal and external reports, focusing instead on the nature of the claim." 835 N.W. at 306 n.4 (citing *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998); *Thomas v. Med Ctr. Physicians, P.A.*, 61 P.3d 557, 565-66 (Idaho 2002); *Connelly v. State*, 26 P.3d 1246 (Kan. 2001)).

Some jurisdictions, like Minnesota and New Jersey, have *both* statutory remedies and wrongful discharge common-law remedies available to whistleblowers. *See, e.g., Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 453 (Minn. 2006) ("We hold . . . that the Minnesota Whistleblower Act does not preclude common-law wrongful-discharge claims [in violation of public policy] premised on *Phipps [v. Clark Oil & Refining Corp.]*, 408 N.W.2d 569 (Minn. 1987)."); *Pierce*, 417 A.2d at 512.

In sum, there is no shortage of remedies for those employees who complain internally but not to the SEC. Indeed, "the scope of legal avenues for the creative attorney of the discharged whistleblowing employee is quite expansive." Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Com-*

parative Legal, Ethical, and Pragmatic Analysis, 45 S. TEX. L. REV. 543, 608 (2004) (commenting that "[a]lthough a few jurisdictions appear very conservative regarding the 'public policy' doctrine, many are quite liberal, and ever-evolving, and thus afford the terminated whistleblowing employee, even the at-will employee, the excellent opportunity to use the public policy doctrine as a very viable vehicle for legal redress.").

Based on the ready availability of these alternate remedies, and as Petitioner has argued forcefully in its brief, there is no need to expand the Dodd-Frank definition of "whistleblower" beyond what the plain and unambiguous statutory language dictates. *See* Pet. Br. 13-14, 16-19; *see also Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) ("Because Congress has directly addressed the precise question at issue, we must reject the SEC's expansive interpretation of the term 'whistleblower' for purposes of the whistleblower-protection provision.") (citation omitted); *see generally United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself. . . . [I]t is also where the inquiry should end, for where, as

here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"). Under that plain language, an individual must complain to the SEC to qualify as a Dodd-Frank "whistleblower." Reversal of the decision below is warranted.

II. The Predicament Faced by Lime Energy and by Prestige Cruises (If the District Court's Dodd-Frank Holding Is Reversed) Illustrates the Burdens Placed on Employers by Judicial Deference to the SEC Regulation.

Both Lime Energy and Prestige Cruises (if the district court's Dodd-Frank holding is reversed) provide the Court with concrete examples of the burdens imposed by the decision below on national employers in light of judicial deference to the SEC's regulation (Rule 21F-2(b)(1)),[4] and how critically important it is that the issue be resolved so the Dodd-Frank Act is consistently applied in accordance with the plain, unambiguous language of the statute.

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[4] The district court below deferred to the SEC's regulation, Rule 21F-2(b)(1), which provides that a person who makes only an internal disclosure is a "whistleblower" under the anti-retaliation provision of the Dodd-Frank Act. Pet. App. 40a; Pet. Br. 10.

Lime Energy initially hired Wendy P. Dressler, plaintiff in *Dressler v. Lime Energy*, as an administrator of the public sector for New York projects, but she later held the position of accounting manager of the utilities division. No. 3:14-cv-07060, DE1, Compl. ¶¶ 3-9. She alleges she raised concerns internally about discrepancies in the company's accounts receivable but admittedly did not go to the SEC. *Id.* ¶¶ 15-17, 23-26, 30-38, 40. She further alleges she was terminated as a result. *Id.* ¶ 2.

On July 17, 2012, Lime Energy issued a press release advising that it had discovered misreporting that might require restatement of affected financial statements. *Id.* ¶ 44. On November 5, 2012, Dressler and other employees were terminated as the result of an internal investigation. *Id.* ¶ 47.

The District Court held that Dressler qualified as a "whistleblower" under the Dodd-Frank Act, holding that the whistleblower-protection provision of the Dodd-Frank Act is ambiguous under *Chevron* (while noting it was a close issue) and deferring to the SEC's regulation as "a reasonable and permissible construction of the Dodd-Frank Act's whistleblower protection provision." *Dressler v. Lime Energy*, No. 3:14-cv-07060, 2015 U.S. Dist. LEXIS 106532, at *37-42 (D.N.J. Aug. 13, 2015). In doing so, the

District Court cited to the lower court's holding in *Digital Realty* as support for its ruling. *Id.* at 40-42. After Lime Energy's motion to dismiss was denied, the case entered an extensive discovery phase. The case has now been stayed pending this Court's decision.

Dressler was terminated on November 5, 2012, but she did not file her complaint with the District Court until November 10, 2014. Therefore, Dressler is the perfect example of a plaintiff who could have sued under the Sarbanes-Oxley Act, which provided another avenue of redress, but chose not to, and now seeks relief as a Dodd-Frank "whistleblower." The statute of limitations for the Sarbanes-Oxley Act is six months, *see* 18 U.S.C. § 1514A(b)(2)(D), so under that statute, while Dressler had every right to seek relief, she chose not to. Dressler's lawsuit under Sarbanes-Oxley is now time-barred. In marked contrast, the statute of limitations for the Dodd-Frank Act is between *six and ten years*. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii). Because the District Court held that, despite failing to raise her concerns with the SEC, Dressler was a "whistleblower" under the Dodd-Frank Act, she was able to file her claim in federal court.

Moreover, the Dodd-Frank Act allowed her to bring a retaliation claim in the District

Court in the first instance, *see* 15 U.S.C. § 78u-6(h)(1)(B)(i), whereas the Sarbanes-Oxley Act would have required her to first exhaust her administrative remedies by filing a complaint with the Department of Labor, *see* 18 U.S.C. § 1514A(b)(1).[5] These differences between the statutes were part of a conscious strategy to award financial incentives and additional protections to complainants who adhered to Dodd-Frank procedures, including the requirement to directly report to the SEC, to increase the amount and caliber of the complaints made to the SEC.

Indeed, the principal purpose of the Dodd-Frank whistleblower provision, according to the SEC, was "to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the *Commission* . . . providing information to persons conducting an *internal investigation* may not . . . achieve the statutory purpose of getting high-quality, original information about

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[5] The Dodd-Frank Act also provides that whistleblowers can seek double back pay, *see* 15 U.S.C. § 78u-6(h)(1)(C), but they may not do so under the Sarbanes-Oxley Act, *see* 18 U.S.C. § 1514A(c).

securities violations directly into the hands of Commission staff." 76 Fed. Reg. 34,308 (emphases added); *see also* 156 CONG. REC. S5929 (daily ed. July 15, 2010) (statement of Sen. Chris Dodd) ("The Congress intends that the SEC make *awards that are sufficiently robust* to motivate potential whistleblowers to share their information and to overcome the fear of risk of the loss of their positions. Unless the whistleblowers come forward, the Federal Government will not know about the frauds and misconduct.") (emphases added). In contrast with the Sarbanes-Oxley Act, which provides that internal reports are sufficient, the Dodd-Frank Act's expressed purpose of encouraging whistleblowers to share information with the SEC justifies the longer statute of limitations and ability to file directly in district court.

Dressler's lawsuit was salvaged by the District Court's finding that she was a Dodd-Frank Act "whistleblower," placing the viability of her claim squarely within the ambit of the question presented by Digital's petition. Her case illustrates the dramatic expansion accomplished by the decision below, which flouted the presence of unambiguous, clear statutory language.

The district court in *Duke* reached the opposite conclusion as the district court in *Dress-*

ler—recognizing that under the plain, unambiguous language of Dodd-Frank, an individual is considered a "whistleblower" protected by the statute against retaliation only if he or she first reports securities law violations to the SEC. Because it was undisputed that Duke never reported any alleged violations to the SEC, he is not a "whistleblower" under Dodd-Frank, and thus has no private cause of action under that statute against Prestige Cruises and the other defendants for alleged retaliation. If the Eleventh Circuit reverses the district court's decision in *Duke* on the Dodd-Frank issue, then Prestige Cruises will again face the burden placed on it at the beginning of the case and the burden placed on Lime Energy in *Dressler*.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,
Petitioner,

v.

PAUL SOMERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL WHISTLEBLOWER CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The National Whistleblower Center ("NWC") is a nonprofit, tax-exempt organization dedicated to the protection of employees who lawfully report illegal conduct.[1] *See* www.whistleblowers.org. Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject. In 2016, the NWC was named a Grand Prize winner of USAID's Wildlife Crime Tech Challenge for its innovative solution to use whistleblowers to combat wildlife crime.[2]

The NWC has participated before this Court as *amicus curiae* in *English v. General Elec.*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter*, 135

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters granting blanket consent to the filing of *amicus* briefs with the clerk.

[2] This international competition, was sponsored by the U.S. Agency for International Development, in partnership with the Smithsonian Institution and National Geographic. https://www.usaid.gov/news-information/press-releases/sep-1-2016-usaid-announces-grand-prize-winners-wildlife-crime-tech-challenge.

S. Ct. 1970 (2015); *Universal Health Svcs. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016); and *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436 (2016).

During the drafting of the Dodd-Frank Act ("DFA"), the NWC proposed adding Subdivision (iii) to the Act's anti-retaliation section. The NWC was the first organization to meet with the U.S. Securities and Exchange Commission concerning implementation of the whistleblower rules.[3] During the SEC's rulemaking proceedings, the NWC filed numerous written comments and met individually with each Commissioner to explain the importance of protecting internal whistleblowers. *See infra* note 10. In the final rulemaking, the Commission cited to the NWC's comments forty-five times. *See* Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300 (June 13, 2011).

Amici Donna Boehme was the first global compliance and ethics officer for two multinationals. As Group Compliance and Ethics Officer for BP plc (London), she established the company's first global compliance and ethics function in 2003, including the company's global code of conduct, covering 100,000+ employees in over 100 countries, a dedicated global compliance and ethics team and a groundbreaking network of 135+ senior-level business ethics leaders. At BOC Group (now part of Linde Group), she

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[3] *See Memorandum from the Office of the Chairman regarding meeting with National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Aug. 23, 2010), https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml.

established the company's first global compliance and ethics function and its first global code and program.

As Principal of Compliance Strategists LLC, Ms. Boehme advises a wide spectrum of private and public entities on compliance matters. She serves on the respective boards of RAND Center of Corporate Ethics and Governance, Rutgers Center for Government Compliance & Ethics. She is an Emeritus Member and past Board member of the Ethics and Compliance Officer Association, a past Board member of the Association of Corporate Counsel – Europe, and past Advisory Board member of The Society of Corporate Compliance & Ethics. She was a charter member of the Conference Board Council on Corporate Compliance & Ethics, the Compliance and Ethics Leadership Council of the Corporate Executive Board and a past member of the Ethics Resource Center (Fellows Program). *See Donna C. Boehme*, COMPLIANCE STRATEGISTS, http://compliancestrategists.com/pro/our-team/donna-c-boehme. Ms. Boehme submitted comments and met with SEC Commissioners during the rulemaking proceeding.

SUMMARY OF THE ARGUMENT

The question in this case is whether the Dodd-Frank Act ("DFA") whistleblower provisions protect internal reporting. For the reasons argued herein, this Court should affirm the holding of the U.S. Court of Appeals for the Ninth Circuit.

First, Congress explicitly authorized the U.S. Securities and Exchange Commission ("SEC" or "Commission") to conduct a rulemaking and determine the "manner" in which a "whistleblower" can provide information to the Commission. During the rulemaking proceedings, the regulated community strongly urged the Commission to incorporate internal disclosures into the core definition of a "whistleblower" covered under the DFA. In the final rules, the Commission exercised its discretion to incorporate internal disclosures into the definition of "whistleblower." To now hold that the DFA does not protect internal reporting would upend the plain language of the DFA and the process by which the Commission established the "manner" for making reports.

Second, Digital's argument that the rulemaking proceeding did not address the anti-retaliation provisions of the DFA is false and misleading. The Commission expressly requested – and received – comments pertaining to "the interpretation or implementation of the anti-retaliation provisions of Section 21(h)."

Third, basic rules of statutory construction require that 15 U.S.C. § 78u-6(h)(1)(A)(iii) ("Subdivision (iii)") protect internal reporting. Protecting internal reports harmonizes the DFA with the securities laws as a whole. Subdivision (iii)'s definition of protected disclosures was inserted into the statutory provisions well after the more general definition of "whistleblower" in the DFA at 15 U.S.C. § 78u-6(a)(6), and is thus controlling.

Fourth, Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A) not only protects internal disclosures, but also disclosures to the DOJ and Congress. If this Court strikes down protections for internal disclosures, it will also strike down protections for employees who report to Congress and the DOJ. To contend that Congress would write itself and the DOJ out of the definition of protected disclosures exemplifies the fallacy of Digital's argument.

Finally, the legislative history and administrative and judicial precedents under whistleblower laws analogous to the DFA demonstrate that Congress intended disclosures to compliance departments and managers to be fully protected. Interpreting the DFA as not covering internal disclosures "would nullify not only the protection against discharge but also the fundamental purpose of the Act," reducing the Act to "a hollow promise of protection." *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1971).

The judgment below should thus be affirmed.

ARGUMENT

I. THE SEC ESTABLISHED THAT THE "MANNER" IN WHICH A "WHISTLEBLOWER" CAN PROVIDE INFORMATION TO THE COMMISSION INCLUDES INTERNAL REPORTS.

Congress explicitly granted the U.S. Securities and Exchange Commission ("SEC" or "Commission") the authority to define the "manner" in which an individual could provide the SEC with information and qualify as a "whistleblower" under the DFA.[4] Thus, the entire predicate of Digital Realty Trust, Inc.'s ("Digital") petition, that the SEC "invent[ed] a different definition" of whistleblower, is unsupportable. The SEC was in fact required by Congress to define the "manner" in which information was provided to it.

For good reason,[5] the SEC decided that one such manner would be for a whistleblower to report

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[4] The DFA states that the "term 'whistleblower' means any idvidudal who provides . . . information relating to a violation . . . to the Commission, **in a manner establishshed, by rule or regulation, by the Commission.**" 15 U.S.C. § 78u-6(a)(6) (emphasis added).

[5] The real risks facing internal whistleblowers were documented in a 2015 comprehensive survey. THE POLITICS OF INTERNAL AUDITING, INSTITUTE OF INTERNAL AUDITORS RESEARCH FOUNDATION (2015). The Institute of Internal Auditors is a 180,000-member organization representing auditors. The study found that 49% of Chief Auditing Executives were told "not to perform audit work in high-risk areas," while another 55% were "directed to omit important findings" from their audit reports. *Id.* Many auditors reported retaliation for

potential securities law violations internally to their company, who in turn would be under numerous regulatory duties to investigate and self-report to the Commission any actual violations.[6] As stated by the Chair of the SEC at the time, "[p]erhaps most significantly, the final rules would give credit to a whistleblower whose company passes the information along to the Commission, even if the whistleblower does not." Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

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refusing to alter their reports. The co-author of the report, Larry Rittenberg, Professor Emeritus at the Wisconsin School of Business, described the findings by stating "[i]t was shocking to see the extent to which practicing internal auditors have been subjected to political pressure . . . This wasn't simply a few horror stories from shaken internal auditors in bad job situations. We found pervasive efforts to undermine transparency and effective corporate governance." Peter Kerwin, *Internal Auditors Face Intense Political Pressures to Influence Findings*, UNIV. OF WISCONSIN (March 16, 2015), https://bus.wisc.edu/knowledge-expertise/newsroom/press-releases/2015/03/16/internal-auditors-face-intense-political-pressures-to-influence-findings.

[6] Digital is required to file, under oath, quarterly and annual reports to the SEC which must attest to the accuracy and competence of the company's internal controls and be certified by its Chief Executive Officer and Chief Financial Officer. *See, e.g.*, Digital Realty Trust, Inc., Quarterly Report (Form 10-Q) (Aug. 9, 2017). Digital must certify that, based their "internal control" procedures, they have identified "[a]ll significant deficiencies and material weaknesses" with these controls, and can attest to the fact that they have "disclosed" "[a]ny fraud, whether or not material, that involves management." *Id.* at Ex. 31.1.

Despite Digital's contention otherwise, whistleblowers who report internally are currently covered by the plain language of the whistleblower definition of the DFA. 15 U.S.C. § 78u-6(a)(6). The Commission's decision to include internal reporting as one of the "manners" in which an individual could qualify as a "whistleblower" is controlling on this Court.

A. The Regulated Community Urged the SEC to Incorporate Internal Disclosures into the Core Definition of the "Manner" Employees Could Qualify as a "Whistleblower."

During the SEC's rulemaking proceeding, one of the most debated issues concerned the Commission's authority under Section 78u-6(a)(6) to define the "manner" for which an individual must provide information to the Commission to qualify as a "whistleblower." *See Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934,* ("*Comments*") *File No. S7-33-10*, U.S. SEC. & EXCH. COMM'N (last modified Apr. 27, 2015), https://www.sec.gov/comments/s7-33-10/s73310.shtml.

During these proceedings, not one corporation or corporate trade association urged the Commission to narrowly define "whistleblower" as covering only persons who report violations to the Commission. Rather, the regulated community, en masse, strongly

urged the SEC to define the "manner" an employee could qualify as a "whistleblower" to include persons who reported violations internally. Numerous corporations even argued that internal reporting should be a **mandatory** requirement that employees would have to meet in order to become a qualified "whistleblower."

For example, the law firm of Covington & Burling, on behalf of a wide-range of companies, including Apache Corp., Cardinal Health, Goodyear Tire, Hewlett-Packard, Merck, Microsoft, Procter & Gamble, and United Technologies, recognized the "extraordinarily broad rulemaking authority" granted the Commission to establish the "manner" in which an individual could become a "whistleblower" and urged the SEC to interpret this section to support "effective internal reporting procedures." *Comments*, COVINGTON & BURLING LLP 2-3 (Feb. 18, 2011), https://www.sec.gov/comments/s7-33-10/s73310-283.pdf.

The Association of Corporate Counsel ("ACC"), a 26,000-member organization representing "attorneys employed in the legal departments of corporations and private-sector organizations worldwide," stated it "strongly support[s] protections for individuals who identify and report misconduct" internally. *Comments*, ASSOC. OF CORP. COUNSEL 1 n.1, 3 (Dec. 15, 2010), https://www.sec.gov/comments/s7-33-10/s73310-126.pdf. While recognizing "the valid concern that some employees will fear retaliation for blowing the whistle," the ACC stated its belief that "[t]he solution to that problem is not, however, a

scheme to undermine important and effective internal compliance and reporting systems; rather, employees who **fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress.**" *Id.* at 5 (emphasis added). Indeed, the ACC urged the SEC to adopt a definition of "whistleblower" as an employee who reports "internally first." *Id.* at 5 n.10.[7]

Dozens of other comments submitted by the regulated community strongly encouraged the SEC to incorporate internal whistleblowing into the definition of a "whistleblower." *See Comments*, U.S. SEC. & EXCH. COMM'N https://www.sec.gov/comments/s7-33-10/s73310.shtml.[8]

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[7] Consistent with the concerns raised by the ACC, the Commission was provided a "White Paper" presented at the RAND Center for Corporate Ethics and Governance Conference Proceedings on March 5, 2009, documenting the problems with creating effective corporate compliance programs post-SOX and explicitly calling upon "Congress and regulators" to "do more to support effective" compliance programs. Donna Boehme, *From Enron to Madoff: Why Many Corporate Compliance and Ethics Programs Are Positioned for Failure*, RAND CENTER FOR CORPORATE ETHICS AND GOVERNANCE 30 (March 5, 2009), https://www.rand.org/pubs/conf_proceedings/CF258.readonline.html. Among the major deficiencies identified within the existing compliance programs was a lack of independence for Chief Ethics and Compliance Officers and the need for "vigorous enforcement of non-retaliation policies." *Id.* at 31. The central issue raised in this White Paper and presented to key policy makers just prior to the enactment of the DFA was "how can companies put integrity back in business?" *Id.*

[8] *See, e.g., Comments*, INST. OF INTERNAL AUDITORS 1, 3 (Dec. 17, 2010) (urging the Commission to "take every effort to encourage, support, and strengthen effective processes within

Amici Chamber of Commerce was among the most aggressive commentators recognizing the "ample discretion" the Commission has to define the "manner" for which whistleblowers can "submit their allegations" to include internal reporting. *Comments*, CHAMBER OF COMMERCE 3, 3 n.6 (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10//s73310-194.pdf. It recognized that internal reporting could

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companies" to investigate fraud and to "protect and champion internal whistleblowers."); *Comments*, BUS. ROUNDTABLE INST. 3, 8 (Dec. 17, 2010) (asking the Commission to ensure that the manners established by the Commission for employees to report violations "encourage employees and other potential whistleblowers to first utilize the well-developed internal compliance elements of leading companies" and establish rules that would permit reporting procedures that "both afford whistleblower protection and allow for appropriate . . . internal investigation activities."); *Comments*, DELOITTE & TOUCHE LLP 8 (Dec. 17, 2010) (recognizing that the "SEC has broad authority to promulgate a final rule that requires timely internal reporting . . . The SEC may, for example, limit the definition of 'whistleblower' to one who first uses internal whistleblower procedures," and has the authority to predicate the amount of a reward on "prompt internal reporting"); *Comments*, ALCOA ET AL. 11, 15 (Dec. 17, 2010) (companies including Alcoa, Citigroup, Intel, Johnson & Johnson, Pfizer and Prudential, acknowledging the "longstanding Commission guidance" promoting internal reporting and asking the Commission to require whistleblowers to use internal procedures and "promote internal reporting in its final rules"); *Comments*, D.C. BAR SECTION ON CORP., FIN., AND SEC. LAW 4 (Dec. 17, 2010), (proposing that the Commission expand the anti-retaliation protections to apply to internal programs"); *Comments*, GEN. ELEC. CO., ET AL. 1 (Dec. 17, 2010) (filing by General Electric, Google, Honeywell, JPMorgan Chase, Microsoft, and Northrop Grumman asking the Commission to require whistleblower's eligible for a reward to "report any potential violation internally.").

preserve "scarce government enforcement dollars." *Id.* The Chamber also informed the Commission that their proposal "would not affect the scope of the statutory retaliation protections afforded whistleblowers under the [SEC] rule," citing directly to § 78u-6(h)(1)." *Id.* at 14.

Outside of the rulemaking proceedings, the Chamber also sponsored a so-called "Blue Ribbon" Panel that accurately recognized that the "greatest" "risk" to internal compliance was a work environment "where employees are unwilling or unable to make management aware of their knowledge of or suspicions that wrongdoing is taking place." REPORT OF ECI'S BLUE RIBBON PANEL, ETHICS & COMPLIANCE CERTIFICATION INSTITUTE 27-28 (2016). In its brief before this Court the Chamber could not explain how excluding internal reports under the DFA would promote the recommendations of its own "Blue Ribbon" panel.

The fact that the overwhelming majority of the regulated community requested incorporating internal disclosures into the core definition of a "whistleblower" is not surprising. Much of Congress' statutory framework and the SEC's regulatory scheme are predicated on internal controls and internal reporting. Incentivizing internal reporting creates the factual record that the Commission relies upon to ensure compliance with the law.[9] Securities

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[9] Digital's own Quartely Report makes note of this: "The company maintains disclosure controls and procedures that are designed to ensure that information required to be disclosed in its reports filed under the Securities Exchange Act of 1934, as

Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300, 34,322-23 (June 13, 2011); 17 C.F.R. §§ 240.13a-15(e), (f); 17 C.F.R. §§ 240.15d-15(e), (f).

Mr. Steven J. Pearlman, who at the time was a partner in the firm of Seyfarth Shaw LLP and is now counsel of Record for *amicus curiae* Chamber of Commerce of the United States of America, delivered a "White Paper" before the Rand Center for Corporate Ethics and Governance which discussed these dynamics. Specifically, he explained how the provisions in the pre-DFA securities laws "require[d] employers to establish robust internal compliance mechanisms, such as anonymous reporting procedures [15 U.S.C. § 78j-1], independent audit committees [*id.*], effective internal financial controls [15 U.S.C. § 7262], and comprehensive codes of ethics and conduct [15 U.S.C. § 7264]." STEVEN J. PEARLMAN, NEW WHISTLEBLOWER POLICIES AND INCENTIVES: A PARADIGM SHIFT FROM "OVERSIGHT" TO "INSIGHT" (2011), *reprinted in* Michael D. Greenberg, *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank*, RAND CORPORATION CONFERENCE PROCEEDINGS 33, 36 (2011), https://www.rand.org/pubs/conf_proceedings/CF290.readonline.html.

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amended, is recorded, processed, summarized and reported within the time periods specified in the U.S. Securities and Exchange Commissions rules and forms, and that such information is accumulated and communicated to its management, including its chief executive officer and chief financial officer, as appropriate, to allow timely decisions regarding required disclosure." *See, e.g.*, Digital Realty Trust, Inc., Quarterly Report (Form 10-Q) at 77 (Aug. 9, 2017).

Mr. Pearlman's expert White Paper explained that the "policy behind" this statutory "framework was to incentivize employees to report fraud internally so that companies could draw on their internal compliance machinery to promptly investigate the fraud in a manner calculated to protect investors . . ." *Id.*

In accordance with federal regulatory law, Digital implemented a work-rule requiring all employees to report any potential frauds internally to their supervisor or the legal department. CODE OF BUSINESS CONDUCT AND ETHICS, DIGITAL REALTY TRUST, INC. 6 (Feb. 17, 2016), http://s21.q4cdn.com/814695872/files/doc_downloads/highlights/2016/Code-of-Business-Conduct-and-Ethics-(Revised-Feb.-17-2016).pdf.

Based in large part on the emphatic response from industry to promote internal reporting, the Commission exercised its discretion to incorporate internal disclosures into the definition of "whistleblower" in its final rules.[10]

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[10] The NWC supported effective and independent compliance programs (and the SEC's final rule), but opposed the proposals that would make internal reporting *mandatory*. The basis for this opposition included the obstruction of justice provision that was passed by Congress as part of the Sarbanes-Oxley Act, codified at 18 U.S.C. § 1513(e). That provision makes it illegal to deny any person anything of value because that person made a truthful disclosure to a federal law enforcement agency concerning a potential crime. This provision of law establishes an overriding public policy that prevents any government agency, corporation, or individual from obstructing the right of a

B. The SEC Exercised Its Discretion Under 15 U.S.C. § 78u-6(a)(6) to Incorporate Internal Disclosures into the Core Definition of the "Manner" Employees Could Qualify as a "Whistleblower."

Congress required the SEC to determine the "manner" in which an individual could qualify as a "whistleblower" under 15 U.S.C. § 78u-6(a)(6). After the most comprehensive rulemaking proceeding ever conducted by an executive agency on any whistleblower law, the SEC incorporated internal whistleblowers into the core definition of a "whistleblower" under the DFA. In response to numerous comments received, the Commission carefully weighed the benefits of internal reporting, and established rules that encouraged such conduct, while explicitly prohibiting retaliation against those who made such reports. The reasons given by the Commission for protecting and encouraging internal reporting were to:

- "Allow companies to take appropriate actions to remedy improper conduct at an early stage";
- "Allow companies to self-report";

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whistleblower to disclose criminal violations to federal law enforcement. In the final rules, the Commission struck the appropriate balance, setting forth rules that encouraged or incentivized internal reporting, yet recoginzing the right of whistleblowers to report directly to the government, if they so choose. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,324-27.

- "Avoid undermining internal compliance programs";
- "Allow the Commission to preserve its scarce resources by relying upon corporate compliance programs";
- "Promote a working relationship between the Commission and companies"; and
- "Increase the quality of tips."

76 Fed. Reg. at 34,324.

The specifics of the final rules make clear that internal reporting is incorporated into the core definition of "whistleblower." For example, entire classes of employees cannot become "whistleblowers" until they permit internal compliance programs a minimum of 120 days to investigate problems and self-report any verified concerns to the SEC. 17 C.F.R. § 240.21F-4(b)(iv)(4)(v)(C). If no anti-retaliation protection existed within those 120 days, internal reporting would present an enormous risk, therefore obfuscating and defeating the purpose of the provision. Additionally, under the rules, all employees are strongly encouraged to utilize compliance programs, and are provided a monetary incentive for participating in these programs. 17 C.F.R. §§ 240.21F-6(a)(2)(ii), 240.21F-6(a)(4). Conversely, employees who undermine such programs are sanctioned, and can have any award substantially reduced. *Id.* § 240.21F-6(b)(3).

The SEC, through its Congressionally-delegated authority, created a "manner" unique among whistleblower laws, such as the False Claims Act. It is the only whistleblower law for which an employee could be credited as a whistleblower by internally submitting information to their company who would then self-report to the SEC. *See* Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2— Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

The Commission's anti-retaliation provisions covering internal reporting are simply ancillary to these substantive provisions, and the numerous provisions of securities law that require internal controls and corporate self-reporting. It would have been inconsistent with the legislative purposes behind the DFA, and an abuse of discretion, for the SEC to create rules mandating internal reporting for numerous employees, and providing a monetary inventive for internal reporting for all employees, without ensuring that persons who report internally are not subjected to retaliation.

Digital refers to the "express definition" of the term "whistleblower" and then claims that the SEC could not "invent a different definition." Pet'r's Br. at 12. Digital did not participate in the rulemaking proceeding which determined the definition of "whistleblower." However, the definition of "whistleblower" was not set in stone by Congress. 15 U.S.C. § 78u-6(a)(6). Congress required the Commission to "establish" the "manner" in which an

individual becomes a "whistleblower," i.e. the manner in which an individual would "provide" information to the Commission. *Id.* Digital, by failing to participate in the rulemaking, apparently also did not review the hundreds of comments submitted by the regulated community, demanding, in the strongest terms, that internal reporting be incorporated by the Commission into the core definition of how individuals would "provide" "information" to the Commission and become a "whistleblower."

Digital cannot explain how the SEC can, on the one hand, require extensive internal controls, and on the other hand, how the SEC lacks the authority to ensure that these controls are not undermined by retaliation. Likewise, Digital cannot explain why their CEO and CFO must certify, on a quarterly basis, that their internal controls are working, and that they have internally identified all frauds, yet still maintain that the SEC is somehow without authority to ensure that the employees who provide critical information as part of the internal control requirements cannot be subjected to harassment, intimidation, and retaliation simply for reporting these potential frauds. If adopted by this Court, Digital's argument would upend the process by which the SEC establishes the manner for making reports, and upend the regulatory structure that requires strong internal controls to protect investors and the American public from fraud.

II. DIGITAL'S ARGUMENT THAT THE SEC GAVE "NO HINT THAT IT WAS CONSIDERING EXPANDING THE DEFINITION OF 'WHISTLEBLOWER'" IS FALSE AND MISLEADING.

Digital argues that the SEC failed to provide "fair notice" when its final rules created an "unheralded" and "drastic" change to the definition of "whistleblower." Pet'r's Br. at 42. Digital claims the Commission gave "no hint" that it was "considering expanding the definition of 'whistleblower,'" and requested no comments on the issue. *Id.* Not only is this argument not supported on the record, it is also false and misleading.

The relationship between internal and external whistleblowing was the most contentious issue addressed in the SEC rulemaking. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488 (Nov. 17, 2010); 76 Fed. Reg. 34,300; Mary L. Shapiro, SEC Chairman, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), https://www.sec.gov/news/speech/2011/spch052511mls-item2.htm ("[N]o issue received more focus during this process than the role of internal compliance programs."). Obviously, if the SEC was planning to encourage or require employees to make internal disclosures prior to being considered a "whistleblower" under the reward-related definition of that term, they would also have to ensure that

whistleblowers who made internal reports were protected from retaliation.

Shortly before the Commission published its proposed whistleblower rules, it held an open meeting during which SEC Commissioner Kathleen L. Casey explained that the Commission was seeking comments on "**what . . . the scope of the anti-retaliation provisions [should be].**" Kathleen L. Casey, SEC Commissioner, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Nov. 3, 2010), https://www.sec.gov/news/speech/2010/spch110310klc-whistleblowers.htm (emphasis added).

Fourteen days after the public meeting, the SEC published its rulemaking proposal, and formally asked for comments on the anti-retaliation provisions of the DFA:

> [T]he Commission is seeking comment on whether it should promulgate rules regarding the interpretation or implementation of the anti-retaliation provisions of Section 21(h) of the Exchange Act. If so, what specific rules should the Commission consider promulgating? . . . Should the application of the anti-retaliation provisions be limited or broadened in any other ways?

75 Fed. Reg. at 70,511.

As discussed above, *supra* Section I, the comments received regarding the anti-retaliation provisions strongly supported protection for internal whistleblowers. For example, the D..C. Bar Section on Corporate, Financial and Securities law urged the Commission to explicitly protect internal whistleblowers from retaliation.[11] The National Whistleblower Center ("NWC") submitted numerous separate comments supporting the protection of internal whistleblowers.[12] In addition to written comments, the NWC met individually with every

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[11] *Comments*, D.C. BAR SECTION ON CORP., FIN., AND SEC. LAW 4 (Dec. 17, 2010) (suggesting the Commission expand "the anti-retaliation protections to whistleblowers who report to persons with legal, compliance, audit, supervisory or governance responsibilities" for the company as "Section 21F(h)(1)(A)(iii) allows the Commission to so expand the anti-retaliation protections to apply to internal programs").

[12] National Whistleblower Center comments on the proposed rules are available, by date, at: https://www.sec.gov/comments/s7-33-10/s73310.shtml and https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml. *See* IMPACT OF *QUI TAM* LAWS ON INTERNAL COMPLIANCE: A REPORT TO THE SECURITIES EXCHANGE COMMISSION, NWC (Dec. 17, 2010); *Comments and Legal Guidance Concerning Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Jan. 25, 2011); *SEC Rule Making Proceeding – Whistleblower Regulations*, NWC (Feb. 10, 2011); *Comments and Legal Guidance Concerning Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 7, 2011); *Provision-by-Provision Analysis of Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 17, 2011); *Proposed SEC Rule 240.21F-8 and CFTC Rule RIN number 3038-AD04, for Implementing Whistleblower Provisions of the Dodd-Frank Act*, NWC (Mar. 17, 2011).

Commissioner and urged them to explicitly protect internal whistleblowers as part of their final rules.[13] No comments were submitted suggesting that the SEC did not have the authority to protect internal whistleblowers from retaliation, or suggesting that Subdivision (iii) did not protect internal disclosures as held by the Second and Ninth Circuits.

The Commission specifically requested, and received, comments regarding the scope of anti-retaliation provisions in the DFA. Digital's contention

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[13] Memos detailing these National Whistleblower Center meetings are available, by date, at: https://www.sec.gov/comments/s7-33-10/s73310.shtml and https://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower.shtml. *See Memorandum from the Division of Enforcement regarding a January 25, 2011, meeting with representative of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Jan. 31, 2011); *Memorandum from the Office of Commissioner Aguilar regarding a February 10, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Feb. 10, 2011); *Memorandum from the Office of Commissioner Paredes regarding a February 11, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Feb. 11, 2011); *Memorandum from the Office of Commissioner Casey regarding a March 11, 2011, meeting with representatives of the National Whistleblower Center*, U.S. SEC. & EXCH. COMM'N (Mar. 11, 2011); *Memorandum from the Office of Commissioner Walter regarding a March 16, 2011, meeting with representatives of the National Whistleblowers Center*, U.S. SEC. & EXCH. COMM'N (Mar. 16, 2011); *Memorandum from the Division of Enforcement regarding a March 28, 2011, meeting with representatives of the National Whistleblowers Center, O'Donoghue and O'Donoghue LLP, and the National Coordinating Committee of Multi-Employer Plans*, U.S. SEC. & EXCH. COMM'N (Mar. 31, 2011).

that it was provided "no hint" of those intentions is frivolous.

III. BASIC RULES OF STATUTORY CONSTRUCTION REQUIRE THAT THIS COURT INTERPRET SUBDIVISION (III) AS PROTECTING INTERNAL DISCLOSURES AND DISCLOSURES TO FEDERAL LAW ENFORCEMENT.

Subdivision (iii) unquestionably mandates internal whistleblowers be protected under the DFA. Toward the end of the legislative process, after the House and Senate passed their own versions of the DFA's whistleblower provisions, Congress added a new substantive definition of what constituted a protected disclosure at Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A). *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 152-53 (2d Cir. 2015) (setting forth the legislative history of Subdivision (iii)). Prior to the addition of Subdivision (iii), activity protected under the DFA covered disclosures only "to the Commission" or for "testifying in, or assisting in" Commission proceedings. 15 U.S.C. §§ 78u-6(h)(1)(A)(i), (ii).

Under the blackletter law of statutory construction, Subdivision (iii) must be interpreted as incorporating SOX anti-retaliation provisions into the DFA's core definition of a protected disclosure and permit employees fired for making an internal disclosure of securities fraud to file a DFA retaliation case.

A. The Securities and Exchange Act Must be Interpreted as a Whole.

That a statute must be interpreted "as a whole" is well-established. *Heydenfeldt v. Daney Gold*, 93 U.S. 634, 639 (1876); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). This settled rule of statutory construction was set out in *New Lamp Chimney v. Ansonia Brass & Copper Co.* when this Court stated that a particular provision in a statute "does not stand alone," and thus "must be read and applied in connection with" the entire regulatory scheme "so that each and every section of the act may . . . have their due and conjoint effect without repugnancy or inconsistency." 91 U.S. 656, 662 (1875); *see also Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989).

The DFA's whistleblower protection provisions "do not stand alone" and must be read as "part of" the "general system of statutory regulation" governing publicly traded corporations. *See New Lamp Chimney Co.*, 91 U.S. at 662. The anti-retaliation provisions therefore "must be read and applied in connection with every other" securities law section relating to whistleblower protection – including Subdivision (iii)'s invocation of SOX protections. *Id.*

The Securities Exchange Act mandates internal corporate controls, and predicates most of the SEC's enforcement actions on the assumption that the numerous internal disclosures stemming from these requirements are truthful. *See* STEVEN J. PEARLMAN, NEW WHISTLEBLOWER POLICIES AND

INCENTIVES: A PARADIGM SHIFT FROM "OVERSIGHT" TO "INSIGHT" (2011), *reprinted in* Michael D. Greenberg, *For Whom the Whistle Blows: Advancing Corporate Compliance and Integrity Efforts in the Era of Dodd-Frank*, RAND CORPORATION CONFERENCE PROCEEDINGS 33, 36 (2011), https://www.rand.org/pubs/conf_proceedings/CF290.readonline.html. This includes "anonymous reporting procedures [15 U.S.C. § 78j-1], independent audit committees [*id.*], effective internal financial controls [15 U.S.C. § 7262], and comprehensive codes of ethics and conduct [15 U.S.C. § 7264]." *Id.*

In accordance with these laws, Digital is required to make numerous reports to the SEC attesting to the accuracy of its internal reporting and the integrity of its internal controls. Digital has in fact regularly filed such sworn declarations on an annual and quarterly basis. *See, e.g.*, Digital Realty Trust, Inc., Annual Report (Form 10-K) at 77 (Mar. 1, 2017).

Securities laws are predicated both on the right of employees to report fraud to the SEC, and an obligation that publicly traded companies have extensive and truthful internal reporting requirements that encourage employees to report frauds internally. Based on these internal reporting requirements the top corporate executives are required to personally sign declarations, every quarter, to the SEC, identifying any frauds identified through these internal controls.

Because the DFA retaliation provisions must be read in the context of the Securities Exchange Act as

a whole, it would be contrary to the letter of the statute, and inconsistent with its reason and spirit, to enact an anti-retaliation law that ignored those parts of federal securities laws that encouraged or required internal reporting. Subdivision (iii) was enacted to ensure that the mandatory internal control rules were harmonized with the DFA's whistleblower provisions. *See Lynch v. Overholser*, 369 U.S. 705, 711 (1962) (finding against a statutory interpretation which was "out of harmony with the awareness that Congress has otherwise shown for safeguarding" certain activities).

B. Harmonious and Consistent Reading of the DFA's Provisions Requires the Protection of Internal Whistleblowers.

Once a statute is viewed as whole, it is often possible to interpret two provisions as in conflict. This Court has previously resolved such issues by attempting to find a harmonious reading which would allow the statue, and the provisions contained within, to be read "consistent[ly] rather than conflicting[ly]" as "a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 1300-01; *Helvering v. Credit All. Corp.*, 316 U.S. 107, 112 (1942).

In *F.T.C. v. Mandel Bros., Inc.*, this Court examined ambiguity between a single statute's definitional provision and another provision in the same statute. *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385 (1959). It found that a statute's scope is not necessarily limited to the definitional provision's text if the statute contains a different provision which

expands the definitional text in a manner that more closely aligns with the purpose of the statute as a whole. *Id.* at 388-90.

The dispute between the definition of "whistleblower" in 15 U.S.C. § 78u-6(a)(6) and its definition in Subdivision (iii) is similarly resolved. Even assuming the whistleblower definition contained in the DFA is unambiguous, reading the DFA and U.S. securities laws as a whole demonstrates that excluding internal whistleblowers from protection contradicts Congress' intent to expand anti-retaliation laws for whistleblowers. The DFA was created to expand the SEC's enforcement powers and increase whistleblower protections, and did so in part by building upon SOX's existing protections.[14] The interaction between the whistleblower definition and Subdivision (iii) is synonymous with the interaction of provisions in *Mandel*, and only by harmoniously reading these provisions together to include internal whistleblowers in the DFA's protections can Congress' intended expansion be effectuated. *Id.* at 390-91.[15]

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[14] *See* S. Rep. No. 111-176 at 38 (2010) ("The SEC would have more help in identifying securities law violations through a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC. **It also expands existing whistleblower law**." (emphasis added)).

[15] Digital argues that somehow balkanizing the SOX and DFA anti-retaliation provisions serves the public interest. However, the entire purpo e of the DFA was to strengthen existing law, not carve out exceptions inconsistent with the overall regulatory scheme. During the Congressional hearings, it was well established that existing anti-retaliaiton laws were not sufficient and as demonstrated in the Boehme White Paper

Additionally, this Court has reasoned that when two allegedly incompatible provisions could be given full effect without creating an absurd, conflicting, or impractical result, such an interpretation should apply. *Helvering*, 316 U.S. at 112. In *Helvering*, the Court rejected a proposed statutory reading which would have allowed one provision to completely overshadow the plain language of another. *Id.*; *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (holding that when the text permits, statutory provisions should be construed as consistent, because subverting one provision to another undermines both the provision's purpose and the underlying legislative purpose).

Analogously, Petitioner's proposed reading of the DFA's whistleblower definition would overpower Subdivision (iii) in contravention of the *Helvering* rationale and the DFA's objective of expanding whistleblower protections. Just as in *Helvering*, this Court should reject the interpretation which would allow one provision to override the plain language and meaning of another when each can be given effect without repugnancy. *Helvering*, 316 U.S. at 112; *Kawasaki*, 561 U.S. at 108.

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to RAND, compliance programs needed further bolstering than had been afforded under SOX. *See* Boehme, RAND CENTER FOR CORPORATE ETHICS AND GOVERNANCE (March 5, 2009), https://www.rand.org/pubs/conf_proceedings/CF258.readonline.html.

C. The Specificity of Subdivision (iii) and the Timing of Its Addition to the DFA Mandates that Internal Whistleblowers be Protected.

If the Court finds the two relevant provisions to be in conflict, it should look to longstanding principles of statutory interpretation and find the DFA provides protection for internal whistleblowers because Subdivision (iii) is both the more specific provision and was the last manifestation of legislative intent.

This Court has affirmed that matters specifically provided for in one provision of a statute shall not be subverted to another provision of the same statute which contains related, but more generally-applicable language. *Bloate v. United States*, 559 U.S. 196, 207-208 (2010); *see Edmond v. United States*, 520 U.S. 651, 657-58 (1997) ("where a specific provision conflicts with a general one, the specific governs"). This principle is especially true where a certain reading of the general provision would violate the "cardinal principle of statutory construction" and render another provision "superfluous, void, or insignificant." *TRW Inc. v. Andrew*, 534 U.S. 19, 31 (2001) (internal quotations omitted); *Duncan v. Walker*, 553 U.S. 167, 174 (2001).

In *Bloate*, this Court recognized that although one provision of the Speedy Trial Act of 1974 was broad enough to encompass time granted to prepare pretrial motions before a criminal trial, it should not preclude application of another provision which more specifically addressed the defendant's leave for pre-

trial preparations. *Bloate*, 559 U.S. at 207-09. This Court recognized that reading the general provision as modifying the specific provision would render the specific provision "virtually superfluous," despite its unambiguous language. *Id.* at 208-09.

Like the interaction between the statutory provisions in *Bloate*, the DFA's whistleblower definition's general language should not be interpreted as a scope-limiting provision that would "modify the contents" of the specific text in Subdivision (iii). *Bloate*, 559 U.S. at 209. Contrary to a general, non-exhaustive definition, Subdivision (iii) was specifically crafted as a mechanism for extending the DFA's anti-retaliation protections to internal whistleblowers from the statutory foundation of SOX. The proposed interpretation provided by Petitioners would render Subdivision (iii) superfluous in violation of the cardinal principle of statutory construction repeatedly espoused by this Court. *TRW Inc.*, 534 U.S. at 31; *Duncan*, 553 U.S. at 174. Therefore, the Court should acknowledge that a "specific provision . . . controls [provisions] of more general application," and give full effect to Subdivision (iii). *Bloate*, 559 U.S. at 207.

Finally, as Subdivision (iii) was added in the final drafting process of the DFA – after the whistleblower definition provision – it trumps any inconsistency with previously inserted provisions. *Russello v. United States*, 464 U.S. 16, 23-24 (1983). As in *Russello*, where this Court determined that removing a limiting provision contained in an earlier draft of a bill should lead to the presumption that

such limitation was not intended by Congress, the late addition of the protection for internal whistleblowing found in Subdivision (iii) unmistakably shows Congress' intent that such whistleblowers are protected, and that the definition of "whistleblower" is not constrained by an earlier inserted provision. *Id.*

IV. DIGITAL'S ARGUMENT WOULD UNDERMINE THE CENTRAL LAW ENFORCEMENT COMPONENTS OF THE REGULATORY SCHEME FAR BEYOND INTERNAL REPORTING.

Subdivision (iii) of 15 U.S.C. § 78u-6(h)(1)(A) protects not just the internal reporting, but also covers disclosures to the Department of Justice ("DOJ") and Congress. It is inconceivable that Congress would draft a major Wall Street reform law and exclude reports to law enforcement and Congress from its protections.

The Sarbanes-Oxley Act ("SOX") – relied on in Subdivision (iii) – includes provisions that protect whistleblowers at publicly traded companies from retaliation where that whistleblower reported to "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a)(1). Digital has focused on the third category of disclosures protected under Subdivision (iii), but for are obvious reasons, failed to explain to this Court that upholding Digital's interpretation of the law would also result in

stripping protections for disclosures to Congress and the DOJ.

To suggest that Congress would preclude the DOJ and Congress from the definition of protected disclosures in the DFA is preposterous. Congress held extensive hearings pertaining to the events that led to enactment of the DFA. It is only logical that Congress would want a law that protects its own witnesses from retaliation. The same is true of the DOJ, which has jurisdiction to investigate and prosecute securities fraud.

Further, the DFA defines "related action" to include "any judicial or administrative action brought by" entities such as the Attorney General. 15 U.S.C. §§ 78u-6(a)(5), (h)(2)(D)(i)(I)-(IV). Based on this definition of a "related action" – as someone who brings information to another agency or government body – the DFA cannot be read as requiring whistleblowers to bring information to **only** the SEC in order to be protected from retaliation. Accordingly, the SEC's adoption of a whistleblower definition tied to Subdivision (iii) is utterly logical.

V. FOR NEARLY 50 YEARS, CONGRESS, COURTS AND ADMINISTRATIVE AGENCIES HAVE HELD THAT INTERNAL EMPLOYEE DISCLOSURES ARE PROTECTED UNDER ANTI-RETALIATION LAWS SIMILAR TO THE DFA.

Although the specific legislative history behind Subdivision (iii) is scant, background for which Congress has legislated on similar whistleblower laws for the past 50 years is robust and clear. Since 1969, Congress has enacted numerous anti-retaliation/whistleblower protection laws, usually as part of a larger reform law. These laws sometimes explicitly protect employees who report internally to their managers, while other laws are similar in nature to 15 U.S.C. § 78u-6(h), and only directly mention reports to government officials or regulators with responsibility over the reform law in question.

However, in numerous cases in which Congressional intent to protect internal disclosures was called into question, Congress clarified its intent to ensure internal disclosures were protected. Likewise, the administrative agencies with mandates to enforce these laws have uniformly interpreted them as protecting internal disclosures. These precedents help clarify Congress' actions in crafting the DFA.

The issue currently before this Court first arose in the context of mine safety. In 1969, Congress enacted the Federal Mine Health and Safety Act

("MHSA"), which, like the DFA, created a broad federal regulatory scheme policing an industry. One part of that law protected whistleblowers, using language similar to DFA Sections 78u-6(h)(i) and (ii).[16] The first court to review a case under MHSA was asked to determine whether an internal report to a supervisor was, as a matter of law, protected activity – even if no report was made to the Mine Health and Safety Commission. Writing for a 2-1 majority of the U.S. Court of Appeals for the D.C. Circuit, Judge Malcom Wilkey firmly established that internal reports – like those articulated in Section 78u-6(h)(1)(A)(iii) – were simply the "first step" in a report to the government, and were thus as equally protected as a direct report to the government. *Phillips v. Interior Bd. of Mine Operations Appeals,* 500 F.2d 772, 781 (D.C. Cir. 1974).

Judge Wilkey's reasoning, which was explicitly ratified by Congress in 1977, is equally applicable to the DFA. First, Judge Wilkey understood that miners were in "the best position to observe the compliance or noncompliance with safety laws" and that "sporadic

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[16] In relevant part, the 1969 MHSA stated: "No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act." 91 P.L. 173, 83 Stat. 742 §§ 110(b)(1), (2).

federal inspections can never be frequent or thorough enough to insure compliance." *Id.* at 778.

Second, Judge Wilkey understood that "miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management." *Id.* Thus, "only if miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can [MHSA] be effectively enforced." *Id.*

Finally, the employee's "notification to the foreman of possible dangers is an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of [MHSA] into play." *Id.* at 779.

Because of the controversy surrounding the protection of internal disclosures highlighted in *Phillips* (which had a strong dissent), Congress explicitly ratified the holding in *Phillips* and other cases that protected internal disclosures. *See* S. Rep. No. 95-181 (1977) , 3436 ("The committee intends to insure the continuing vitality of various judicial interpretations of section 110 of [MHSA] which are consistent with the broad protections in the bill's provisions; See, e.g., *Phillips v. IBMA*, 500 F.2d 772.").

Thereafter, other courts relied upon this Congressional ratification of MHSA's whistleblower

provision to endorse similar interpretations of other laws to protect internal disclosures, including the Energy Reorganization Act. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) ("*Phillips* . . . unequivocally stand[s] for the proposition that internal activities are to be protected under the original version of [MHSA]. Thus, it is clear that Congress was advocating the protection of internal action.").

The court in *Phillips* also considered the company's internal operating procedures for further support that internal disclosures needed broad protection, looking to the "procedure implementing the statute" that was "actually in effect" at the mine in which the employee worked. *Phillips*, 500 F.2d at 779. Those procedures mandated that miners report safety concerns to their supervisors as a first step in the investigatory process. As noted by Judge Wilkey, "the existence of this procedure in itself was a practical recognition that the bare words of [MHSA], unless implemented by some procedure at the mine to bridge the gap between 'the Secretary or his representative' ... and the coal miner himself ..., would be completely ineffective in achieving mine safety." *Id.* at 779, 781.

Similar procedures existed within Digital Realty. These procedures, codified in Digital's Code of Business Conduct and Ethics, were distributed to every employee, and published online in the web page dedicated for investor information:

"All employees have a duty to report any known or suspected violation of this Code and any violation of laws, rules, regulations or policies that apply to the Company.

* * *

If you know of or suspect a violation of this Code, immediately report the conduct to your supervisor. Your supervisor will contact the General Counsel, who will work with you and your supervisor to investigate your concern. . . You may also report [to the company by mail]. . . You may also . . . report by telephone via the Company's confidential hotline.

* * *

Your supervisor, the General Counsel and the Company will protect your confidentiality to the extent possible, consistent with law and the Company's need to investigate your concern. The Company strictly prohibits retaliation against an employee who, in good faith, seeks help or reports known or suspected violations."

CODE OF BUSINESS CONDUCT AND ETHICS, DIGITAL REALTY TRUST, INC. 6 (Feb. 17, 2016),

http://s21.q4cdn.com/814695872/files/doc_downloads/highlights/2016/Code-of-Business-Conduct-and-Ethics-(Revised-Feb.-17-2016).pdf.

After Congress ratified Judge Wilkey's decision in *Phillips*, every court and administrative agency aware of this ratification applied the *Phillips* holding to a wide range of whistleblower laws that, like the 1969 MHSA, failed to explicitly include internal disclosures as a first step in making a report to the government. *See, e.g.*, *Kansas Gas*, 780 F.2d at 1512-13 (citing to ratification to hold that internal reporting is protected under the Energy Reorganization Act); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) (citing to *Phillips* and Congressional ratification of that holding); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993) (internal reporting protected, citing to *Phillips); Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162-63 (9th Cir. 1984) (citing to *Phillips*); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 489 n.11 (5th Cir. 2005) (internal whistleblowing protected under Clean Air Act based on Congressional ratification theory).

More recently, under the Whistleblower Protection Enhancement Act of 2012 ("WEPA"), Congress explicitly "clarified" the meaning of whistleblower disclosures under the Whistleblower Protection Act of 1989. In the Senate Report discussing the WEPA, Congress explained that it was rejecting the "narrow definition" of a protected disclosure, and was "clarify[ing]" its original intent to protect internal disclosures. The section of the report

which clarified Congress' original intent to protect internal disclosures was entitled "Clarification of what constitutes a protected disclosure." S. Rep. No. 112-155 at 4 (2012) (emphasis in original). Thereafter, the Merit System Protection Board, the agency with responsibility for interpreting the WEPA, found that the explicit incorporation of internal disclosures into the definition of a protected disclosure was a clarifying amendment. *Day v. Dep't of Homeland Sec.*, 2013 MSPB 49 (June 26, 2013).

The U.S. Secretary of Labor, who has jurisdiction to administer numerous whistleblower laws that do not explicitly cover internal reports, has carefully reviewed the issue of internal versus external reporting for nearly 40 years. Under every administration, beginning with President Ronald Regan, the Secretary has consistently held that internal reports are fully protected under statutes comparable to Section 78u-6(h). *See, e.g., Wells v. Kansas Gas & Elec. Co.*, No. 83-ERA-12 (June 14, 1984) (D&O of Sec'y Donovan) (internal protected under Energy Reorganization Act); *Poulos v. Ambassador Fuel Oil Co., Inc.*, No. 86-CAA-1 (Apr. 27, 1987) (D&O of Sec'y Brock) (internal protected under Clean Air Act); *Flor v. U.S. Dept. of Energy,* No. 93-TSC-1 (Dec. 9, 1994) (D&O of Sec'y Reich) (internal protected under Toxic Substances Control Act); *Nathaniel v. Westinghouse,* No. 91-SWD-2 (Feb. 1, 1995) (D&O of Sec'y Reich) (internal protected under the Solid Waste Disposal Act and the Comprehensive Environmental Response, Compensation, and Liability Act). In *Willy v. Coastal Corp.*, Secretary of Labor Brock justified his holding that internal reports

were protected under the Clean Air Act whistleblower provision by explaining that Congress "expressly" "clarify[ied] its "approval" of *Phillips*. *Willy v. Coastal Corp.*, No. 85-CAA-1 (June 1, 1994) (D&O of SOL).

As explained in *Phillips*, the failure to protect the first steps in reporting a violation – i.e. internal complaints – "would nullify not only the protection against discharge, but also the fundamental purpose of the Act," reducing it to "a hollow promise of protection." *Phillips*, 500 F.2d at 781.

VI. DIGITAL'S POSTION WILL UNDERMINE THE SUCESSFUL SEC WHISTLEBLOWER PROGRAM.

The DFA whistleblower program has had a "transformative impact" on the Commission's enforcement program,[17] "both in terms of the detection of illegal conduct and moving . . . investigations forward quicker and through the use of fewer resources." *The SEC's Whistleblower Program: The Successful Early Years*, SIXTEENTH ANNUAL TAXPAYERS AGAINST FRAUD CONFERENCE (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-

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[17] 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, U.S. SEC. & EXCH. COMM'N at 1 (Nov. 15, 2016), https://www.sec.gov/files/owb-annual-report-2016.pdf ("The transformative effect of the SEC's whistleblower program has had on the agency's enforcement program is further demonstrated by the hundreds of millions of dollars that have been returned to investors. . . [I]t has also bolstered the agency's enforcement efforts and aided harmed investors.").

whistleblower-program.html (comments of SEC Division of Enforcement Director Andrew Ceresney).

As observed by Commission Chair Mary Jo White, because of the success of the SEC whistleblower program, "[g]one are the days when corporate wrongdoing can be pushed into the dark corners of an organization." Mary Jo White, SEC Chair, The SEC as the Whistleblower's Advocate, SEC. LAW INST., NORTHWESTERN UNIV. SCH. OF LAW (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html. Employees can now "view internal reporting as an effective means to address potential wrongdoing without fear of reprisal or retaliation." *Id.* The SEC's effective implementation of the DFA was a "game changer." *Id.*

This Court should not undo the careful balance struck by the SEC, which harmonized the internal control requirements set forth in federal securities law, with the whistleblower award and retaliation provisions in the DFA. The law is working; investors are protected; companies are investing in their compliance programs. Whistleblowers need to be encouraged, whether they report violations directly to the SEC, or work through the internal control procedures established under U.S. securities law.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue whether the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), codified at 15 U.S.C. § 78u-6(h), applies to employees who have not reported a violation of the securities laws to the Securities and Exchanges Commission, when Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]." 15 U.S.C. § 78u-6(a)(6).[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored their amicus brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), amici state that counsel of record for each party has filed with the Court a blanket letter of consent to the filing of amicus briefs.

small businesses located primarily in the New England region.

AIM is a 100-year-old nonprofit, nonpartisan association, with over 4,500 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

Amici are committed to enforcing federal statutes according to their terms. When, as here, a statute provides a specific and unambiguous definition of a term, that definition must apply wherever the term appears in the statute. Any change to the statute must come from the Legislature, not the Judiciary.

In addition to this amicus brief, amici have filed many other amicus briefs in this Court, arguing for the enforcement of federal statutes according to their terms.[2]

For these and other reasons discussed below, NELF and AIM believe that their brief will assist the Court in deciding the issue presented in this case.

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[2] *See, e.g., Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970 (2015); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

SUMMARY OF ARGUMENT

At issue is the meaning of a subsection of Dodd-Frank's "Securities whistleblower incentives and protection" section, 15 U.S.C. § 78u-6, which protects "a whistleblower [from retaliation in the workplace] . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act [SOX] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6). SOX, however, affords protection to the employee who only reports a potential securities law violation to his employer. And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to his employer.

The lower court erred because it abandoned Dodd-Frank's clear provision that a "whistleblower" is an employee who reports to the SEC. This definition must apply whenever the word "whistleblower" appears in the disputed subsection of Dodd-Frank. And applying this definition to the disputed language yields only one meaning. The employee who reports information to the SEC is protected when he *also* reports that information to his employer and then suffers retaliation because of his internal reporting.

This subsection of Dodd-Frank therefore protects an employee who has reported to both the

SEC and her employer, when the employer does not know that the employee has reported to the SEC. And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank. She would only be protected under SOX for her internal reporting. By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

The Ninth Circuit apparently rejected the statute's plain meaning. In that court's view, the disputed language identified a set of circumstances that was "narrow[] to the point of absurdity . . . ." Appendix to Petitioner's Petition for Certiorari 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort. Nor is it a court's role to conform an unambiguous statute such as this one to the court's own notion of what Congress may have had in mind.

But this is precisely what the Ninth Circuit did here, when it "interpreted" the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. The Ninth Circuit impermissibly substituted the word "employee" for the defined term "whistleblower." And Dodd-Frank's specific definition of a whistleblower excludes all other possible meanings of that term. Moreover, Congress chose the word "employee" in SOX's whistleblower provision but did not do so when it later enacted Dodd-Frank. It must be presumed that this choice was deliberate.

In any event, it is hardly absurd for Congress to assume that an employee may choose to report to both the SEC and her employer, and that the employer may not know that such an employee has reported to the SEC. Consistent with SOX's purposes, an employee may wish to report a potential violation to her employer, for speedy internal resolution of the matter. But, consistent with Dodd-Frank's purposes, that same employee may also wish to alert the SEC to the matter, to secure her right to pursue Dodd-Frank's special financial incentives (a potentially large bounty) and legal protection (including the right to recover double back pay). And the employer may not know that such an employee has reported to the SEC because Dodd-Frank and the SEC regulations both preserve the confidentiality of a whistleblower's identity.

If allowed to stand, the Ninth Circuit's decision would certainly eviscerate Dodd-Frank's definition of a whistleblower. But in so doing, the lower court's approach would also contravene Congress' purpose of linking Dodd-Frank's special financial incentives with its enhanced remedial protection. In the lower court's view, an employee can sue for retaliation under Dodd-Frank even though he is not eligible for a bounty under that statute, because he has not reported to the SEC. But Dodd-Frank's incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting information to the SEC.

ARGUMENT

I. THE DODD-FRANK ACT, BY ITS OWN PLAIN TERMS, ONLY PROTECTS EMPLOYEES WHO REPORT POTENTIAL SECURITIES LAW VIOLATIONS TO THE SECURITIES AND EXCHANGES COMMISSION.

A. Dodd-Frank Defines A "Whistleblower" As An Employee Who Reports Information To The SEC, and That Definition Must Apply Each Time The Word "Whistleblower" Occurs In The Statute.

At issue is the meaning of a subsection of the "Securities whistleblower incentives and protection" section of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), 15 U.S.C. § 78u-6. The disputed subsection prohibits an employer from retaliating against "a whistleblower . . . because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201 *et seq.*) ["SOX"] . . . ." 15 U.S.C. § 78u-6(h)(1)(A)(iii). That same section of Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC] . . . ." 15 U.S.C. § 78u-6(a)(6).

SOX, however, affords protection to the employee who only reports a potential securities

law violation to "a person with supervisory authority over the employee," i.e., her employer. 18 U.S.C. § 1514A(a)(1)(C).[3] And the Ninth Circuit in this case interpreted the disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to her employer. Appendix to Petitioner's Petition for Certiorari ("App.") 7a-10a.

The lower court erred because it abandoned Dodd-Frank's clear provision that a "whistleblower" is an employee who reports to the SEC. 15 U.S.C. § 78u-6(a)(6). Contrary to the Ninth Circuit's view, a court must apply a specific statutory definition of a term each time that term appears in the statute. "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

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[3] To be precise, SOX protects an employee from workplace discrimination when he reports to "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (B) a person with supervisory authority over the employee . . . ." 18 U.S.C. § 1514A(a)(1)(A)-(C).

B. The Disputed Subsection Of Dodd-Frank Simply Means That An Employee Who Reports Information To The SEC Is Protected When He Also Reports That Information To His Employer And Then Suffers Retaliation For His Internal Reporting.

Applying Dodd-Frank's definition of a whistleblower to the disputed subsection yields only one meaning. The employee who reports information to the SEC is protected when he *also* reports that information to his employer and then suffers retaliation because of his internal reporting. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation and internal quotation marks omitted).

In particular, the disputed subsection provides, in relevant part:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any

> other manner discriminate against, *a whistleblower* in the terms and conditions of employment *because of any lawful act done by the whistleblower*-- . . .
>
> **(iii)** *in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002* (15 U.S.C. 7201 *et seq.*) . . . .

15 U.S.C. § 78u-6(h)(1)(A)(iii) (emphasis added).[4] And SOX, it has been noted, protects an employee

---

[4] This subsection provides, in full:

> **(h) Protection of whistleblowers**
>
> **(1) Prohibition against retaliation**
>
> **(A) In general**
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--
>
> **(i)** in providing information to the Commission in accordance with this section;
>
> **(ii)** in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> **(iii)** in making disclosures that are required or protected under the Sarbanes-

who reports a securities law violation to her employer. 18 U.S.C. § 1514A(a)(1)(C).

And so, applying the statutory definition of a whistleblower, at 15 U.S.C. § 78u-6(a)(6), to the disputed text yields the following result:

> No employer may . . . discriminate . . . against [any individual who provides . . . information relating to a violation of the securities laws to the [SEC]] . . . because of any lawful act done by th[at] [individual] . . . in making [internal] disclosures that are . . . protected under [SOX] . . . .

15 U.S.C. § 78u-6(h)(1)(A)(iii). That is, Dodd-Frank protects an employee from retaliation when he provides information to the SEC but *also* discloses the same information to his employer, and his employer retaliates against him because of his internal reporting.

This subsection of Dodd-Frank, therefore, protects the employee who has reported to both the SEC and her employer, when her employer does not know that she has reported to the SEC. *See Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620,

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> Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*) [SOX], this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii).

627-28 (5th Cir. 2013) (discussing same). And this subsection is necessary because, without it, such an employee would not be protected under Dodd-Frank for her internal reporting. *See id.*[5] She would only be protected under SOX. *See* 18 U.S.C. § 1514A(a)(1)(C). By affording Dodd-Frank protection under these circumstances, then, the disputed subsection encourages an employee to report to both the SEC and her employer.

C. The Ninth Circuit Engaged In Impermissible Judicial Legislation By Refusing To Enforce The Statute According To Its Plain Terms.

The Ninth Circuit was apparently unwilling to accept the plain meaning of § 78u-6(h)(1)(A)(iii). Indeed, the lower court rejected the scope of that subsection as being "narrow[] to the point of absurdity . . . ." App. 8a. But it is not for the courts to pass judgment on congressional line drawing of this sort. "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989).

After all, in matters of social and economic regulation, such as here, Congress is free to define a protected class as specifically as it chooses.

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[5] *See also* n.4, above. The other categories of protected activity under Dodd-Frank apply only when an employee has supplied information to the SEC or has participated in an SEC enforcement action based on that information. *See* 15 U.S.C. § 78u-6(h)(1)(A)(i)-(ii).

"[Legislative] reform may take one step at a time." *United States v. Morrison*, 529 U.S. 598, 631 n.2 (2000) (citation and internal quotation marks omitted). *See also Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18 (2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done . . . [here, to protect the employee who reports to both the SEC and his employer from retaliation for his internal reporting,] devoid of reason and effect.").

Nor is it a court's role to rewrite an unambiguous statute to fit the court's own notion of what Congress may have had in mind. "It is not our role to conform an unambiguous statute to what we think Congress probably intended[.]" *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 n.6 (2009) (internal quotation marks omitted).

But this is precisely what the Ninth Circuit did here, when it "interpreted" the disputed language to protect employees who are not Dodd-Frank whistleblowers because they have not reported to the SEC. In so doing, the Ninth Circuit engaged in impermissible judicial legislation because it effectively substituted the word "employee" for the defined term "whistleblower." *See* App. 10a. But the lower court had no business making such a change. "We must presume that the legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (citation and internal punctuation marks omitted). Moreover, "[i]t is axiomatic that the statutory

definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987).

Notably, Congress chose the word "employee" in SOX's whistleblower provision, 18 U.S.C. § 1514A(a), but it did not do so when it later enacted § 78u-6 in Dodd-Frank. It must be presumed, then, that Congress' omission of the word "employee" in Dodd-Frank was deliberate. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal punctuation marks omitted). In short, the Ninth Circuit had no basis to disregard the plain meaning of the disputed subsection.

D. Dodd-Frank's Protection Of The Employee Who Reports To Both The SEC And His Employer Is Not So Bizarre That Congress Could Not Have Intended It.

In any event, Dodd-Frank's protection of the employee who reports to both the SEC and his employer from retaliation for his internal reporting is hardly absurd. "We cannot say that [affording protection under such circumstances] is *so bizarre that Congress could not have intended it.*" *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)

(emphasis added) (citation and internal quotation marks omitted).

In particular, the scope of the disputed subsection rests on two assumptions: (1) that an employee would choose to report to both the SEC and his employer, and (2) that the employer would not know that such an employee has reported to the SEC. Neither of these assumptions is "so bizarre" or absurd that it would warrant judicial disregard of the statute's plain meaning.

For instance, an employee may choose to report a potential violation to her employer, to bring the matter to its immediate attention for quick internal resolution. After all, SOX was enacted precisely to encourage and protect such internal reporting. *See* 18 U.S.C. § 1514A(a)(1)(C). But that same employee may also wish to alert the SEC to the matter at this early stage, to secure her right to pursue Dodd-Frank's special financial incentives and legal protections. Indeed, Congress enacted Dodd-Frank in response to the 2008 financial crisis, and the whistleblower provision was designed to motivate corporate insiders to come forward and report potential securities law violations to the SEC, in order to assist that agency in enforcing the securities laws.[6]

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[6] In fact, Congress received testimony that the SEC depended primarily on the tips of corporate insiders to identify and successfully prosecute claims of securities fraud. *See* S. Rep. 111-176, at 110-11 (2010) ("In a testimony for the Senate Banking Committee, Certified Fraud Examiner and Madoff whistleblower Harry Markopolos testified in support of creating a strong Whistleblower Program. He cited statistics showing the efficiency of Whistleblower Programs:

In particular, § 78u-6 requires the SEC to award the Dodd-Frank whistleblower a substantial bounty if her reporting of original information to that agency results in a successful administrative or judicial enforcement action. 15 U.S.C. § 78u-6(b).[7] But if an employee who reports a violation internally delays too long in reporting that information to the SEC, the SEC may learn of the information from another source. At that point, the information would no longer be "original" under

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'*whistleblower tips detected 54.1% of uncovered fraud schemes in public companies*. External auditors, and the SEC exam teams would certainly be considered external auditors, detected a mere 4.1% of uncovered fraud schemes. *Whistleblower tips were 13 times more effective than external audits, hence my recommendation to the SEC to encourage the submission of whistleblower tips.*' In his letter to Senator Dodd, SEC Inspector General David Kotz also recommended a similar Whistleblower Program.") (emphasis added).

[7] In particular, § 78u-6(b) requires the SEC to pay a whistleblower an award from the Investor Protection Fund (§ 78u-6(g)), in an amount between 10% and 30% of the penalties collected by the SEC in a "covered judicial or administrative action" resulting from "original information" provided by that whistleblower. 15 U.S.C. § 78u-6(b)(1)(A)-(B).

"Original information" is information that "is derived from the independent knowledge or analysis of a whistleblower [and] . . . is not known to the Commission from any other source . . . ." 15 U.S.C. § 78u-6(a)(3)(A)-(B). A "covered judicial or administrative action," in turn, is "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. § 78u-6(a)(1).

Dodd-Frank, and the employee would no longer qualify for a bounty.[8]

Section 78u-6 also provides the Dodd-Frank whistleblower with generous legal protection. In particular, the Dodd-Frank whistleblower enjoys a direct right of action in federal court to recover double back pay, subject to a generous six-year limitations period that can be tolled for up to ten years. 15 U.S.C. § 78u-6(h).[9] By contrast, SOX offers none of these protections.[10] Consequently, the employee who reports to her employer, as a SOX whistleblower, would want to qualify quickly as a Dodd-Frank whistleblower (by reporting to the

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[8] *See* n.7, above.

[9] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (providing private right to sue in federal court for retaliation for engaging in protected activity, as defined in § 78u-6(h)(1)(A)(i)-(iii)); § 78u-6(h)(1)(B)(iii)(I)-(II) (providing statute of limitations of six years after date of violation, tolled by three years after date "when facts material to the right of action are known or reasonably should have been known," and capped by ten-year statute of repose); § 78u-6(h)(1)(C)(i)-(iii) (providing prevailing employee with reinstatement, double back pay, litigation costs, expert witness fees, and reasonable attorneys' fees).

[10] Under SOX, for example, the employee has no direct right of action and must instead file a claim with the Secretary of Labor before obtaining the right to sue in federal court. 18 U.S.C. § 1514A(b)(1)(A). And that administrative filing requirement is subject to a clipped 180-day limitations period. 18 U.S.C. § 1514A(b)(2)(D). Finally, while the prevailing employee may recover compensatory and special damages under SOX, she cannot recover double back pay. *See* § 18 U.S.C. § 1514A(c)(1)-(2).

SEC), before her employer may take any adverse action against her due to her internal reporting. In short, it is neither absurd nor bizarre to assume that an employee may wish to report to both the SEC and her employer.

Nor is it so bizarre to assume that an employer may not know that such an employee has reported to the SEC. This is because Dodd-Frank preserves the confidentiality of a whistleblower's identity when she reports to the SEC, unless and until the disclosure of her identity is necessary in the SEC's enforcement action. 15 U.S.C. § 78u-6(h)(2)(A).[11]

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[11] That subsection provides, in relevant part:

> Except [under limited circumstances], the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, . . . unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission . . . .

15 U.S.C. § 78u-6(h)(2)(A). Moreover, the SEC allows whistleblowers to report tips through its confidential website and ensures that "[t]he SEC treats all tips, complaints and referrals as confidential and nonpublic, and does not disclose such information to third parties, except in limited circumstances authorized by statute, rule, or other provisions of law." https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Aug. 25, 2017).

In sum, the plain meaning of the disputed subsection is far from absurd. Indeed, it actually serves the twin aims of SOX and Dodd-Frank, by encouraging an employee to report potential violations of the securities laws to both his employer and the SEC. Therefore, courts should enforce § 78u-6(h)(1)(A)(iii) according to its plain terms, and the Ninth Circuit's decision should be reversed.

II. THE NINTH CIRCUIT'S APPROACH WOULD CONTRAVENE CONGRESS' CLEAR PURPOSE OF LIMITING THE AVAILABILITY OF DODD-FRANK'S FINANCIAL INCENTIVES AND REMEDIAL PROTECTION TO THE EMPLOYEE WHO HAS EARNED THEM BOTH, BY REPORTING TO THE SEC.

If allowed to stand, the Ninth Circuit's decision would clearly eviscerate Dodd-Frank's definition of a whistleblower. But in so doing, the lower court's approach would also contravene Congress' clear purpose of linking Dodd-Frank's special financial incentives with its enhanced remedial protection.[12] In the Ninth Circuit's view, an employee may sue for retaliation under Dodd-Frank even though he does not qualify for a bounty, because he has not reported to the SEC.

But this is not what Congress had in mind. After all, the provision is titled "Securities whistleblower incentives *and* protection." 15 U.S.C. § 78u-6 (emphasis added). And, true to

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[12] *See* notes 7 and 9, above.

its title, that provision expressly limits its financial incentives and its legal protection to the "whistleblower," i.e., the employee who reports to the SEC. 15 U.S.C. § 78u-6(a)(6).

In Congress's judgment, then, Dodd-Frank's incentives and remedies are not severable from each other. Instead, they go hand in hand. And they are only available to the employee who has earned them both, by reporting to the SEC.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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RECORD AND BRIEFS

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v.

PAUL SOMERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Taxpayers Against Fraud Education Fund ("TAFEF") respectfully submits this brief as *amicus curiae*.

TAFEF is a nonprofit, tax-exempt organization dedicated to advancing and protecting whistleblower approaches to fraud enforcement by federal and state authorities. TAFEF consulted with legislative and agency stakeholders in drafting the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the accompanying rules and regulations. TAFEF's members regularly make whistleblower submissions to the Securities and Exchange Commission (the "Commission") on behalf of individuals to protect investors and markets through a public-private partnership.

SUMMARY OF ARGUMENT

This case calls for the application of a well-settled principle: when interpreting a statute, courts and agencies should look to the whole statute to best effectuate Congress's intent. When the statutory definition of a term is in tension with the statute's substantive provisions, courts and agencies adopt

[1] No party's counsel authored this brief in whole or in part, and no persons or entities other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

context-appropriate definitions to resolve this tension. Dodd-Frank's whistleblower provision, 15 U.S.C. § 78u-6, defines "whistleblower" as an individual who reports to the Commission. By not referencing individuals who raise concerns internally, however, this definition undermines the statute's operation and the clear legislative intent behind it. The Commission, by adopting context-appropriate definitions of "whistleblower" to protect internal whistleblowers against retaliation, 17 C.F.R. § 240.21F-2, addressed this problem as it should: by giving full effect to the statute Congress enacted.

I. Rule 21F-2 recognizes that Congress passed Dodd-Frank to solve particular problems. Congress heard a series of similar stories while investigating the 2008 financial crisis and the Madoff Ponzi scheme: whistleblowers tried to alert their employers and the government to massive securities frauds, but were both ignored and retaliated against. Whistleblowers lost their jobs and were blacklisted by the financial services industry. The frauds that whistleblowers sought to expose eventually collapsed, costing investors trillions and bringing global capital markets nearly to a halt.

II. In response to these crises, Congress passed Dodd-Frank to prevent similar problems in the future. A key component of Dodd-Frank is its whistleblower program, for which Congress drew upon testimony and other evidence before it, including its experience with other whistleblower laws. Congress was aware that financial rewards alone would not encourage whistleblowers to step forward: whistleblowers—particularly

those in the financial services sector—also needed more robust protections against retaliation than those offered by Sarbanes-Oxley. Dodd-Frank's whistleblower provision includes both incentives to report and protections from retaliation to encourage whistleblowers to speak up about securities fraud. The whistleblower protections include confidentiality provisions aimed at preventing industry blacklisting.

III. When the Commission adopted rules implementing Dodd-Frank's whistleblower provisions, the regulated community and the Commission agreed that Congress intended to protect whistleblowers who reported potential securities laws violations, regardless of whether the reports were made internally or to the Commission or both. The Commission's Rule, 17 C.F.R. § 240.21F-2, implements this shared understanding of the whistleblower provisions.

IV. Rule 21F-2 likewise comports with the statute's text, structure, and underlying policy. Mechanical application of the statutory definition, as Petitioner urges, ignores the structure of Section 78u-6 by rendering its anti-retaliation and confidentiality provisions incompatible. Petitioner also ignores much of the statute's text, and its reading produces results that advance no apparent legislative purpose. Confronted with similar circumstances, this Court has adopted context-appropriate definitions over statutory definitions and has ordered that agencies do the same. Rule 21F-2 follows this command.

The decision below should be affirmed.

ARGUMENT

I. At the time it enacted Dodd-Frank, Congress understood that the failure to encourage and respond to whistleblowers had undermined protection of investors and the markets.

A. Whistleblowers sought to expose the fraud and noncompliance that led to the Madoff scandal and the financial crisis but were ignored and suffered retaliation.

The 2008 financial crisis and the Madoff scheme collectively destroyed trillions of dollars in wealth. In response, Congress held hearings and created the Financial Crisis Inquiry Commission ("FCIC") to investigate the causes of the crisis. As Congress considered how to prevent these problems from reoccurring, it heard testimony from whistleblowers who had tried to stop the misconduct and to alert the government to the wrongdoing, but who went unheeded and were left unprotected.

The FCIC heard testimony from Richard M. Bowen, III, who shared his experiences as a Citigroup whistleblower. *See Subprime Lending & Securitization & Gov't-Sponsored Entities: Hearing Before the Fin. Crisis Inquiry Comm'n* (2010) (statement of Richard M. Bowen, III). Mr. Bowen had emailed senior management in November 2007 to warn of "significant but possibly unrecognized financial losses existing

within Citigroup." *Id.* at 2. He identified, among other things, tens of billions in risky loans that the company had warranted to investors and that Citigroup may have been required to repurchase if the borrowers defaulted. *Id.* First he was ignored, then he was stripped of most of his responsibilities, and finally he was fired. William D. Cohan, *Was this Whistle-Blower Muzzled?*, N.Y. Times, Sept. 21, 2013, at SR4. Within a year of Mr. Bowen's email, Citigroup's stock fell by more than ninety-five percent.

Congress heard directly from several whistleblowers, including Matthew Lee, who had been with Lehman Brothers for 14 years. *Public Policy Issues Raised by the Report of the Lehman Examiner: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 75-77 (2010) (statement of Matthew Lee). Lee alerted senior management to accounting and valuation irregularities that made the firm appear to be on stronger financial footing than it was. *Id.* He was fired within a week. *Id.* Two other Lehman whistleblowers suffered the same fate. *Id.* at 68 (statement of Rep. Kilroy). Months later, Lehman filed for Chapter 11 bankruptcy protection after 158 years of operation.

The most prominent pre-crisis whistleblower, Harry Markopolos, told Congress that he had alerted the Securities and Exchange Commission to the Madoff Ponzi scheme in 2000. *Assessing the Madoff Ponzi Scheme & Regulatory Failures: Hearing Before the H. Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the Comm. on Fin. Servs.*, 111th Cong. 5

(2009) (statement of Harry Markopolos) ("Markopolos Testimony"). After determining that Madoff's claimed returns were impossible, Mr. Markopolos reported to the Commission in 2000, 2001, 2005, 2007, and 2008, but nothing happened. *Id.* In 2008, after investors had entrusted over $50 billion to Madoff's management, the scheme collapsed. *Id.* For speaking up, Mr. Markopolos was blacklisted from the financial industry. *Id.* at 38-39.

B. The Sarbanes-Oxley Act failed to prevent the financial crisis or adequately protect whistleblowers.

As Congress set out to address these issues, it was not working on a blank slate. Congress had enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("Sarbanes-Oxley"), to prevent the kinds of serious public harm that followed massive frauds at public companies, most notably Enron and WorldCom. With Sarbanes-Oxley, Congress sought to compel companies to establish processes—such as audit procedures and internal reporting—to discover and stop wrongdoing. Among other provisions, Sarbanes-Oxley mandated increased internal controls relating to financial reporting, *see id.* §§ 302, 404, 906, to protect shareholders by encouraging publicly-held companies to engage in greater self-regulation. *See* Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 60 (2011). For similar reasons, Sarbanes-Oxley also included modest protections for whistleblowers at publicly-traded companies. *See* Sarbanes-Oxley § 806.

Of relevance here, these protections included protections from retaliation for raising concerns about suspected wrongdoing internally. *See id.* § 806(a)(1)(C) (codified at 18 U.S.C. § 1514A(a)(1)(C)).

But the Sarbanes-Oxley approach of reliance on self-regulation proved ineffective and did not prevent the financial crisis of 2008. Nor did the Act adequately protect whistleblowers. A study reviewing the first three years of Sarbanes-Oxley whistleblower cases found them "remarkably one-sided," with less than seven percent of whistleblowers winning their cases. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 91 (2007).

C. Whistleblowers generally raise concerns internally and often suffer retaliation as a result.

While Congress was investigating the causes of the 2008 financial crisis, it was learning more about experiences of whistleblowers generally.

The 111th Congress, which enacted Dodd-Frank, also passed the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. L. No. 111-21, 123 Stat. 1617, to amend the False Claims Act. In the FERA debates, Congress considered the experiences of False Claims Act whistleblowers, who often raised concerns internally notwithstanding the potential financial rewards for reporting to the government. As Senator Grassley stated, "[m]ost of the whistleblowers whom I know

about did not even know about whistleblower protection laws, did not even know about false claims laws until they go into it." 155 Cong. Rec. S4412 (daily ed. Apr. 20, 2009). And indeed, studies had found "no evidence" that the financial incentives of the False Claims Act discourage internal whistleblowing. Thomas L. Carson et al., *Whistle-Blowing for Profit: An Ethical Analysis of the False Claims Act*, 77 J. Bus. Ethics 361, 367 (2008).

Reports to and testimony before Congress emphasized that whistleblowers raised concerns internally at their peril. For example, a 2004 Cong. Research Serv. report described the difficulties of pointing out suspected wrongdoing in a corporate setting and identified the types of retaliation that whistleblowers suffered. *See* Mark Jickling, Cong. Research Serv., RL32718, *Barriers to Corporate Fraud: How They Work, Why They Fail* 31 (2004). In hearings before the 110th Congress, a False Claims Act whistleblower described her termination for raising concerns internally and urged Congress to adopt "comprehensive retaliation protections." *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century, Hearing on S. 2041, The False Claims Act Correction Act Before the S. Comm. on the Judiciary*, 110th Cong. 19-21 (2008) (statement of Tina M. Gonter). The 111th Congress also heard that entire industries can retaliate against whistleblowers. *See* Markopolos Testimony at 15, 38-39, 42 (whistleblowers blacklisted from the financial services industry for speaking up).

Social science supported this testimony. A study pre-dating Dodd-Frank noted that in "circumstances where an organization is dependent upon the continuation of the wrongdoing or when they are not dependent upon the whistleblower . . . the organization is more likely to retaliate against the whistleblower and continue the wrongdoing." Jessica R. Mesmer-Magnus, et al., *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, & Retaliation*, 62 J. Bus. Ethics 277, 281 (2005). That same study also found that whistleblowers who report significant and/or frequent wrongdoing face greater risks of retaliation. *Id.* at 292. Retaliation against internal whistleblowers is swift, and often occurs immediately after they report internally. *See* Terry Morehead Dworkin et al., *Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes*, 17 J. Bus. Ethics 1281, 1296 (1998).

Congress had known about these threats to whistleblowers for decades, and had historically legislated to protect against them. In hearings before the 110th Congress, Representative Linda Sanchez noted that Congress added anti-retaliation provisions to the False Claims Act in 1986 after "witnesses testified that they didn't blow the whistle on fraud because there was no anti-retaliation protection." *The False Claims Act Correction Act of 2007: Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. and the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 124 (2008).

II. Congress enacted the Dodd-Frank whistleblower provisions to curb fraud and protect investors by encouraging both internal reporting and reporting to the government through interrelated incentives and protections.

In Dodd-Frank, Congress addressed each of the hurdles facing whistleblowers through comprehensive legislation with provisions that work in tandem to better protect investors by incentivizing and protecting whistleblowers.

Congress recognized that Sarbanes-Oxley presented an unattractive risk-benefit ratio to financial services whistleblowers and sought to address this failure with Section 78u-6. Before Dodd-Frank, whistleblowers had no financial incentive to come forward to the Commission. Although some whistleblowers had contacted the government anyway, Congress was aware that many who knew of the conduct that precipitated the financial crisis had not. Section 78u-6 made reporting to the government more appealing by offering whistleblowers ten to thirty percent of any Commission recovery over one million dollars that resulted from their information. 15 U.S.C. § 78u-6(b)(1). To address whistleblowers' concern that the Commission would ignore their information, Congress mandated that the Commission create an Office of the Whistleblower to administer Section 78u-6. 15 U.S.C. § 78u-7(d).

In response to the financial service industry's blacklisting of whistleblowers, Congress enacted two confidentiality provisions to protect their identities. First, Section 78u-6 provides that whistleblowers may submit information to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A). Second, it prohibits the Commission from "disclos[ing] any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" absent exceptional circumstances. *Id.* § 78u-6(h)(2)(A).[2]

Finally, Congress adopted a provision that protects whistleblowers in the circumstances in which they typically face retaliation. Section 78u-6 provides that:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission

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[2] Although whistleblowers must reveal their identities to the Commission before payment of an award, this has no bearing on the Commission's obligation to keep confidential any information that might identify the whistleblower. 15 U.S.C. § 78u-6(d)(2)(B).

> based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A). Subdivision (iii) references Sarbanes-Oxley, which addresses internal reporting, *see* 18 U.S.C. § 1514A(a)(1)(C), and Section 1513(e), which addresses assistance to the government not reached by Subdivision (ii), *see* 18 U.S.C. § 1513(e). The remaining references serve as a catchall to address other required and protected reports.

III. Both industry and the Commission understood the anti-retaliation provision to protect internal reporting regardless of whether an individual also reported to the Commission.

Upon Dodd-Frank's enactment, both industry actors and the Commission agreed that Section 78u-6's anti-retaliation provisions protected whistleblowers who reported internally regardless of whether they reported to the Commission. In a Commission rulemaking for the statute's implementing regulations, regulated entities and their legal representatives argued that the Commission should require internal reporting as a condition for receiving awards. They claimed that

mandatory internal reporting supported internal compliance programs without undermining whistleblower protections because whistleblowers were protected against retaliation under Section 78u-6:

- "[An internal reporting] requirement would not significantly disadvantage valid whistleblowers because of . . . safeguards against retaliation for internal reporting contained in the Sarbanes-Oxley Act and the whistleblower provisions [of Dodd-Frank]. . . ." Comment Letter from Davis Polk & Wardwell LLP to Secretary Murphy (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-200.pdf.

- "We recognize the valid concern that some employees will fear retaliation for blowing the whistle. The solution to that problem is not, however, a scheme to undermine important and effective internal compliance and reporting systems; rather, employees who fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress." Comment Letter from Association of Corporate Counsel to Secretary Murphy (Dec. 15, 2010), https://www.sec.gov/comments/s7-33-10/s73310-126.pdf;

- "An internal reporting requirement is unlikely to have a negative effect on the proposed rules, as companies would be given a more immediate opportunity to cure or mitigate potential violations and

> the whistleblower would remain protected by the anti-retaliation provisions in the Dodd-Frank Act." Comment Letter from Thompson Hine LLP to Secretary Murphy (Dec. 3, 2010), https://www.sec.gov/comments/s7-33-10/s73310-26.pdf.

The Commission's final rule—Rule 21F-2—also reflects the view that the statute's anti-retaliation provisions protect internal reporting. *See* 17 C.F.R. § 240.21F-2(b).

Ironically, industry's main argument that the Commission should require internal reporting was that whistleblowers would otherwise bypass internal compliance and go straight to the Commission to obtain an award. *See, e.g.*, Comment Letter from U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform to Secretary Murphy (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-194.pdf ("Businesses have a strong self-interest in detecting and eliminating illegal conduct within their organizations. . . . For these reasons, large numbers of companies have implemented strong internal reporting systems to obtain information about potential wrongdoing. . . . And we have no objection to the establishment of a reasonable whistleblower program that allows individuals to bring actionable information to the attention of the SEC when the company itself is unwilling or unable to engage in effective self-policing."). Exactly this result, however, would follow from Petitioner's reading of the statute—that employees

must report to the Commission to benefit from the anti-retaliation protections of Dodd-Frank.

The Commission agreed that Congress did not intend Dodd-Frank to undermine internal reporting and subsequently promulgated several regulations to encourage, but not require, whistleblowers to report internally before coming to the Commission. *E.g.*, 17 C.F.R. § 240.21F-6(a)(4) (increasing award for whistleblowers who first report internally).

IV. The contemporaneous understanding of the anti-retaliation provision is consistent with the statute's text, structure, and the underlying congressional policy.

A. The term "whistleblower" can have different meanings within the statute even if the statute defines the term.

The Commission's regulation applies a context-appropriate definition of "whistleblower" for the anti-retaliation provision in Section 78u-6. This Court has endorsed such an approach when—as here—it best effectuates Congress's intent.

Context often forces identical words and phrases to take different meanings within the same statute, even when that statute defines them. Although the default presumption is that a given term has the same meaning throughout a single statute, *e.g.*, *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007), this presumption "readily yields" to context, as a single term may take on different meanings "in the same statute or even in the same section," *Atl. Cleaners & Dyers v.*

United States, 286 U.S. 427, 433 (1932). And when the meaning of a term derived from statutory context clashes with its statutory definition, the contextual meaning takes precedence. *E.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

For example, despite the statutory definition of "employee" in Title VII of the Civil Rights Act, that term takes on different meanings in the Act's substantive provisions when those provisions are inconsistent with the definition. *Robinson*, 519 U.S. at 342-43. Title VII defines "employee" as "'an individual employed by an employer,'" a definition that appears to cover only current employees. *Id.* at 342 (quoting 42 U.S.C. § 2000e(f)). The statute's substantive provisions, however, extend protections to "employees" who fall outside that definition. Title VII provides for the reinstatement and hiring of "employees," which are remedies applicable only to former and prospective employees, respectively. *Id.*; *see also id.* at 343 n.3 ("employee" plainly covers prospective employees elsewhere in Title VII). The Court interpreted "employee" to have meanings different from the statutory definition as context required. *Id.* at 343-44.

Likewise, the Clean Air Act broadly defines "air pollutant" as "'any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014) (quoting 42 U.S.C. § 7602(g)). But the statute would become impossible to administer if each provision that employed that term regulated every "air pollutant" as

the definition suggests. *Id.* at 2444. The Court held that the EPA's implementing regulations must adopt different, context-specific definitions for "air pollutant" to give effect to the whole statute. *Id.* at 2442; *see also id.* at 2452 (Breyer, J., concurring in part and dissenting in part).

1. **The term "whistleblower" must take a different meaning in the anti-retaliation provision than it does in the reward provision to give full effect to the statute's protections for whistleblowers.**

Although Section 78u-6 defines the term "whistleblower," applying that definition to the anti-retaliation provision precludes the statute's protective provisions from operating in tandem, producing results that Congress could not have intended. The term "whistleblower" must take context-specific meanings throughout Section 78u-6 to give full effect to the statute's substantive provisions.

Section 78u-6 defines "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). Petitioner mechanically applies this definition to the anti-retaliation provision, arguing that it prohibits employers from retaliating against an employee who has reported internally only if that employee has reported to the Commission. But the

other whistleblower protection provisions in Section 78u-6 reveal the need for context-appropriate definitions.

Petitioner's reading of the statute denies its confidentiality benefits to internal whistleblowers who also report to the Commission. The statute provides that whistleblowers may submit information and award claims to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A). It also prohibits the Commission from "disclos[ing] any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" absent exceptional circumstances. *Id.* § 78u-6(h)(2)(A). Applying the statutory definition of "whistleblower" to the anti-retaliation provision is incompatible with these confidentiality provisions: whistleblowers entitled to both types of protections would be forced to choose between them.

Consider an individual who makes an internal report protected by Sarbanes-Oxley, later submits information anonymously to the Commission, and subsequently suffers retaliation for the internal report. Under Petitioner's reading, the statute protects her from retaliation: she is a "whistleblower" who reported to the Commission, and also reported internally. To plead her anti-retaliation claim, however, she would have to plead that she qualified as a "whistleblower" under the statutory definition: *i.e.*, that she submitted information to the Commission. This would force her to sacrifice one statutory protection—anonymity in reporting to the Commission—to secure another—

anti-retaliation remedies.[3] Moreover, under this reading the confidentiality protections are rendered incoherent: she would be required to reveal herself as a Commission whistleblower, while the Commission would still be required to keep that information confidential.

If a statute's provisions cannot operate in tandem when a term takes a single meaning, that single meaning yields to a multiplicity of meanings determined by context, even if the term is defined by the statute. *Utility Air*, 134 S. Ct. at 2444; *Robinson*, 519 U.S. at 343-44. Applying the statutory definition of "whistleblower" throughout Section 78u-6 creates precisely this problem: statutory provisions designed to complement each other instead conflict, with the activation of one rendering the other inoperative. Resolving this tension requires "whistleblower" to take distinct meanings, derived from context, as Rule 21F-2 does.

2. The statute's design also supports context-specific definitions.

Section 78u-6's two distinct policies—incentives and protection—work in tandem to encourage financial industry whistleblowers. 15 U.S.C. § 78u-6. Applying context-specific definitions to those provisions serves these distinct policies.

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[3] Anti-retaliation claims filed under subdivisions (i) and (ii) do not present this problem: a whistleblower filing such a claim has by definition been identified—at least by her employer—as having contacted the Commission.

When Congress wanted only those whistleblowers who reported to the Commission to benefit from a policy, it said so in the text of the provision effecting that policy. The statute's incentive provision mandates awards for "whistleblowers who voluntarily provided original information to the Commission that led" to a successful enforcement action. *Id.* § 78u-6(b)(1). Requiring a report to the Commission makes this provision administrable: to reward a whistleblower for useful, timely information, the Commission must be able to trace that information to a whistleblower.

By contrast, the substantive provision protecting whistleblowers who report internally contains no language requiring a report to the Commission, *id.* § 78u-6(h)(1)(A)(iii), nor would such a requirement have anything to do with the goals of Subdivision (iii). Reporting to the Commission does not serve any purpose related to protecting whistleblowers from retaliation. And reading Subdivision (iii) to require reports to the Commission—as Petitioner advocates—yields absurd consequences. On Petitioner's reading, Subdivision (iii) protects internal whistleblowers who have also reported to the Commission, but its text requires no connection whatsoever between the report to the Commission and the internal report. *Id.*[4] A whistleblower

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[4] Congress plainly knew how to require such a connection: the immediately preceding subdivision protects whistleblowers who assist Commission investigations only when those investigations are "based upon or related to" information the whistleblower provides to the Commission. 15 U.S.C. § 78u-6(h)(1)(A)(ii).

could thus report a suspected violation to the Commission one week, internally report a completely unrelated violation the week after, and be entitled to the anti-retaliation protections of Dodd-Frank for the internal report only because of the unrelated earlier report to the Commission. There is no reason that reporting an unrelated violation to the Commission should make the internal report protected by Dodd-Frank's anti-retaliation protections.[5]

While the statutory definition of "whistleblower" suggests that reporting to the Commission is a condition of applying Dodd-Frank's retaliation protections, applying this definition to the anti-retaliation provision furthers no aim apparent from the statute and produces absurd results. When context-specific definitions better advance a statute's regulatory design than statutory definitions, the context-specific definitions control. *Utility Air*, 134 S. Ct. at 2440.

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[5] Petitioner's fear that, if the statutory definition does not apply, Subdivision (iii) would protect whistleblowers whose internal reports have nothing to do with the securities laws, *see* Br. 38, is unfounded. First, Rule 21F-2 protects from retaliation only those internal whistleblowers whose information "relates to a possible securities law violation" or a violation of Sarbanes-Oxley. *See* 17 C.F.R. § 240.21F-2(b)(1)(i). Second, the context of a statute imposes reasonable restraints on potentially overbroad language. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (given context in which term appears, "tangible object" cannot include fish).

B. Applying Dodd-Frank's anti-retaliation protections to persons who report internally furthers Congress's purpose in ensuring that information about potential fraud is reported.

The Commission's rule follows a well-worn path: "In law as in life . . . the same words, placed in different contexts, sometimes mean different things." *Yates*, 135 S. Ct. at 1082. Rule 21F-2 accordingly applies context-specific definitions to effectuate Congress's purpose for Section 78u-6: expanding whistleblower protections so that companies and the government can more quickly address problems affecting investors and the markets. "From a legal, administrative, and functional perspective—that is, from a perspective that assumes that Congress was not merely trying to arrange words on paper but was seeking to achieve a real-world *purpose*—[this] way of reading the statute is the more sensible one." *Utility Air*, 134 S. Ct. at 2453 (Breyer, J., concurring in part and dissenting in part).

With its context-specific definitions, the Commission's rule gives effect to each provision of Section 78u-6. Rule 21F-2 distinguishes between two types of whistleblowers: those who seek awards and those who seek anti-retaliation remedies. Following the text of the corresponding substantive provision, the rule permits only those individuals who submit information to the Commission to apply for an award. 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-2(a). Likewise, the rule extends anti-retaliation protections to any individual who has reported a possible violation of the securities

laws to the Commission or internally. 15 U.S.C. § 78u-6(h)(1)(A)(iii); 17 C.F.R. § 240.21F-2(b).

Rule 21F-2 completely resolves the tension between the substantive provisions of Section 78u-6. Consider again the case of an individual who reports internally, then reports anonymously to the Commission, and is then fired for her internal report. Under the Commission's regulation, she receives each benefit Congress enacted: she may file an anti-retaliation claim under Dodd-Frank without having to plead her contact with the Commission to establish eligibility as a "whistleblower." She thus remains anonymous to the public as a Commission whistleblower, and the Commission's obligation to keep confidential information that might identify her is not rendered incoherent.

Rule 21F-2 also recognizes that Congress enacted Dodd-Frank as a response to crises in the financial services industry that whistleblowers had sought to prevent. *See Atl. Cleaners*, 286 U.S. at 435 (historical context of statutes informs their interpretation). In the wake of these crises, Congress intended to prevent future violations of the securities laws by enhancing protections for all whistleblowers—the bulk of whom report internally—who warn of such violations. Exempting the majority of whistleblowers from these protections would undermine Congress's intent.

C. Petitioner's reading of the statute would frustrate Congress's purpose by rendering it less likely that whistleblowers will report misconduct.

Petitioner's reading of Section 78u-6 is flatly at odds with Congress's purpose in enacting Dodd-Frank. Congress was aware that nearly all whistleblowers report internally, and that extending protections to those whistleblowers would enhance compliance with securities laws and better protect investors. *See* pp. 7-9, *supra*. And whistleblowers continue to report internally: in the wake of Dodd-Frank, *ninety-seven percent* of whistleblowers first reported internally, and *eighty-nine percent* escalated first reports internally. Ethics Res. Ctr., *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 13 (2012). Yet under Petitioner's reading of the statute, Dodd-Frank's anti-retaliation provision does not cover internal whistleblowers—by far the largest group—unless they report to the Commission before their employer retaliates against them. This frustrates the goals of a statute designed to encourage and protect whistleblowers.

In addition, Petitioner's reading of the statute makes the confidentiality protections illusory for individuals seeking anti-retaliation remedies. Half of all award recipients eligible to report anonymously do so, and *all* whistleblowers enjoy the statute's confidentiality protections. Sec. & Exch. Comm'n, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower*

Program 18 (2016).[6] On Petitioner's reading, whistleblowers fired for reporting internally could not pursue Dodd-Frank's anti-retaliation remedies without compromising these confidentiality provisions.

Moreover, Petitioner's reading would produce the very result that industry urged the Commission to avoid: undermining internal compliance regimes. The vast majority of whistleblowers who eventually contact the Commission first report internally. Sec. & Exch. Comm'n, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18. Yet Petitioner's reading of the statute would encourage whistleblowers to bypass compliance and go straight to the Commission in order to receive the benefit of the anti-retaliation provision.

Finally, Petitioner's reading does not serve the statute's policies: incentivizing and protecting whistleblowers to better protect investors. Applying Dodd-Frank's protections to whistleblowers simply looking to flag and fix misconduct within their organizations gives them the same robust protections as those who report to the Commission, making retaliation less likely. Protecting internal whistleblowers also preserves scarce government resources, allowing the Commission to focus its attention on corporations that fail to adequately self-regulate. And corporations keep their chance to correct issues internally, benefitting

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[6] Only whistleblowers represented by counsel at the time of their submission may report to the Commission anonymously. 15 U.S.C. § 78u-6(d)(2)(A).

their shareholders by avoiding the unwanted expense and attention of a Commission investigation.

Achieving these benefits requires only the application of a long-followed, unexceptional principle: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850), *quoted in Star Athletica L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). This statute's "object and policy" is protecting investors by encouraging all whistleblowers, and that should guide its interpretation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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